89-1735

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

No.

JOHN POZSGAI,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

In 1988, Petitioner was indicted and convicted on 40 counts for violating the Clean Water Act, 33 U.S.C. §§ 1311, 1319(c)(2)(A) for placing topsoil and clean fill on 5 acres of his own property which the government claimed was a "water of the United States."

Despite the fact that Petitioner had no criminal history and there was no finding of any harm to water quality or wildlife, he was sentenced to prison for three years for the pre-Guideline counts, 27 months for the post-Guideline counts and fined $200,000. This was the longest sentence and the largest fine in the history of the United States imposed on an individual for any environmental crime. The fine represents over 1,000 percent of Petitioner's gross annual income. The questions presented are:

1. Whether petitioner's Fifth Amendment right to due process was violated when no evidence was introduced to prove beyond a reasonable doubt that his property was a "water of the United States" as defined by 33 C.F.R. § 328.3(a).

2. Whether placing "earth" on other earth constitutes a discharge of a "pollutant" "into water" under the Clean Water Act.

3. Whether Section 2Q1.2 of the U.S. Sentencing Guidelines is invalid because it was promulgated in violation of the Sentencing Reform Act, or otherwise was applied to Petitioner in violation of law.

4. Whether the sentence imposed violates the Excessive Fines Clause of the Eighth Amendment.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. _____

JOHN POZSGAI,

Petitioner

v.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, John Pozsgai, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Judgment Order of the court of appeals affirming Petitioner's conviction and sentence was issued on January 12, 1990 without any accompanying opinion and is listed at 897 F.2d 524 (3rd Cir. 1990)(App. 1a). The Judgment Including Sentence Under the Sentencing Reform Act was entered on July

19, 1989 (App. 4a). The order of the district court denying the Motion to Set Aside Verdict and to Enter Judgment of Acquittal, entered on January 27, 1989, was issued without any opinion (App. 14a).

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1990. A timely petition for rehearing was denied on February 8, 1990 (App. 15a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . "

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

2. The Clean Water Act provisions, 33 U.S.C. §§ 1311(a), 1319(c)(2), 1344(a),(e), 1362, and 33 C.F.R. § 328.3(a) are reproduced, *infra*, App. 17a-20a. The Sentencing Reform Act provisions 28 U.S.C. §§ 991, 994(b)(1), (c), (f), (j), (m), and 3553(a) are reproduced, *infra*, App. 20a-23a.

3. United States Sentencing Guidelines §§ 2Q1.2 and 2Q1.3 are reproduced, *infra*, App. 25a.

STATEMENT OF THE CASE

Petitioner, a 57-year-old Hungarian emigre, is a self-employed truck mechanic who works seven days a week in a small garage behind his house in Morrisville, Pennsylvania. Across the street from his home in Morrisville (near Trenton, New Jersey) is a 14-acre lot, which had been used for some 20 years as a dump site for various types of old fill and junk, including auto body parts, and thousands of old tires (R-84, 87, 139, 141).[1] The property is zoned light industrial, and is bordered on the north by Bridge Street, on the south by a four-lane superhighway (U.S. Route 1), an auto salvage yard on the west, and a tire dealership on the east. (Appended are Govt. Exhibits 1 and 7, aerial photographs of the property taken in 1985 and 1987, App. 40a.) Petitioner saw the property not as a dump site, but as an opportunity. By cleaning it up, removing the old tires, and filling a portion of the property, he could fulfill his dream of building a larger garage so that he could expand his truck repair business from its cramped quarters (R-85-86). The government saw the matter differently.

The U.S. Army Corps of Engineers inspected the property beginning in April 1987 and claimed that because of the presence of such vegetation as "skunk cabbage," a common weed, and "sweet gum trees," a common tree endemic to the eastern third of the United States, portions of the property contained "wetlands."[2]

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[1] "R" refers to the Record Appendix below.

[2] The Corps determined that the petitioner's property was "above the headwaters," meaning that he was eligible to fill up to 10-acres of essentially isolated wetlands under the Corps' Nationwide Permit No. 26 because of the minimal impact such fill has on the environ-

(continued...)

The site is not a marsh, swamp, or bog, nor is it listed on the National Wetland Inventory Map.

Petitioner believed that tires dumped in a tiny stream that trickled along the edge of the property caused part of the site to occasionally flood during heavy rains, and that by removing the tires, the property would drain properly.

Petitioner completed the purchase of the property in June 1987 and continued the laborious process of cleaning up the property by removing the thousands of tires and junk parts, and allowing top soil, earth, and clean fill materials to be placed on a few acres of the upland and "wetland" portion of the property along Bridge Street. In the meantime, with the help of his daughter, he sought the assistance of several engineers, who were unable to complete the various permit forms. He did, however, obtain a Bucks County soil erosion permit in May 1988 and maintained a protective silt skirt fence along the small stream (R-Add. H.)

On August 17, 1988, special agents of the Environmental Protection Agency installed video surveillance cameras across the street from the property. On August 24, the government filed a civil suit and obtained an *ex parte* Temporary Restraining Order which they served that evening on Petitioner. Although Petitioner

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[2](...continued)
ment. 33 U.S.C. § 1344(e); 33 C.F.R. § 330.5(a)(26) (R-159); *see Riverside Irrigation District v. Andrews*, 758 F.2d 508, 511 (10th Cir. 1985). If a person wants to take advantage of this 10-acre exemption, "an application for a DA [Department of Army] permit does *not* have to be made.") 33 C.F.R. § 320.1(c) (emphasis added). However, the Corps insisted that he fill one out and that a Water Quality Certificate from Pennsylvania under 33 U.S.C. § 1341 was needed.

placed blockades around the property and traveled to the Pennsylvania Department of Natural Resources in Harrisburg, Pennsylvania to try to resolve the problem, several trucks were in the next few days filmed entering the property and discharging clean fill. No toxic or hazardous waste was involved.

Before the completion of any civil contempt proceeding, Federal Agents came to Petitioner's house on September 12, 1988, placed him in handcuffs, and booked him. On September 29, 1988, he was indicted on 41 Counts of violating the Clean Water Act, 33 U.S.C. §§ 1311(a), 1319(c)(2)(A), by allowing topsoil, earth, and similar clean, non-toxic fill to be placed onto approximately 5 acres of his property without first obtaining an individual permit under 33 U.S.C. § 1344(a).[3]

This case was tried in the United States District Court for the Eastern District of Pennsylvania, before a jury, presided over by the Honorable Marvin Katz. The jurisdiction of the district court was based on 28 U.S.C. §§ 1331, 1345 and 1355. The prosecution presented evidence that portions of the property technically constituted wetlands. There was no evidence that any wildlife or fishery habitat was harmed, or that water quality was impaired.

The defense expert contended that the property was not a wetland, and that whatever wetland characteristics that the property may have exhibited were attributable to the damming effect of the tires in the stream, and that once the tires were removed, the hydrology would change and the property would drain properly and revert

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[3] The Corps never issued a formal cease and desist "order" under their own regulations, which would have specified what the penalties could have been. *See* 33 C.F.R. § 326.3(c)(1), (3).

to its upland condition. The trial took place from December 27 through December 30, 1988.

At the close of the government's case, the defense moved for a directed verdict since the government failed to introduce any evidence that the stream was a tributary of the Pennsylvania Canal or that the Canal was or is used in interstate commerce. These key jurisdictional elements of the offense were cited by the prosecutor in his opening statement as "important in the case." The court denied the motion from the bench without stating any reasons. The jury convicted Petitioner on all Counts.

On January 5, 1989, the defendant filed a Motion to Set Aside the Verdict and Enter Judgment of Acquittal, pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure. Petitioner renewed his jurisdictional argument. The trial court denied the motion to set aside the verdict by Order dated January 27, 1989 without stating any reasons (App. 14a).

Despite the fact that: 1) Petitioner had no criminal history; 2) that the former dumpsite/"wetland" supported no wildlife nor fishery habitat; 3) that nothing was dumped or placed into the water of the adjacent stream (indeed, at the sentencing, Petitioner submitted an environmental assessment of the property prepared by soil scientist Dr. Wendell Kirkham and not disputed by the government that the tiny stream on Petitioner's property runs clearer than it did before Petitioner bought the property because of his removing the junk from the stream); 4) that there was no showing that the topsoil and clean fill placed on the adjacent property contaminated or affected the quality of the water in the nearby stream; and 5) that this was not a serious crime according to the Presentence Report prepared by the

Probation Office, the Court, at the urging of the government to make an example out of Petitioner in order to "send a message to all property owners" and to implement President Bush's "no net-loss of wetlands" goal, sentenced Petitioner on July 13, 1989 under 33 U.S.C. § 1319(c)(2)(A) to the unprecedented statutory *maximum* sentence of three years imprisonment on Counts One through Fourteen which occurred before the Sentencing Guidelines took affect, and to 27 months imprisonment on Counts Sixteen through Forty-one for the post-Guideline conduct.

The staggering 27-month sentence -- equivalent to 81 months, or approximately 7 years if it had been imposed before the Guidelines due to the availability of parole after serving one-third of the sentence -- was the *maximum* sentence the Court could impose pursuant to its interpretation of Section 2Q1.3, the Sentencing Guidelines applicable for environmental offenses involving non-toxic, non-hazardous substances. Sentence of imprisonment on Count Fifteen was suspended and Petitioner was placed on probation for 5 years, the *maximum* term available for any federal offense, to be served after he is released from prison, and to restore the property unless he received an after-the-fact permit.

For the Guidelines counts, petitioner received 6 points (the base offense level) for discharging a pollutant without a permit. § 2Q1.3(a). He also received six additional points for discharging a pollutant (§ 2Q1.3(b)(1)(A)), and four more for not having the permit (§ 2Q1.3(b)(4)). This "double counting" for the same conduct led to a total score of 16, which translates to a sentence of between 21 and 27 months. Petitioner requested that he be placed on probation because of his wife's heart condition and their strong community ties. Judge Katz refused his request.

This draconian sentence, for what was essentially a regulatory offense, was the longest unsuspended jail term imposed in the history of the United States for *any* environmental crime, including the dumping of extremely toxic and hazardous wastes and where people were even injured and killed.

The Court was not yet finished with the Petitioner. Despite the fact that Mr. Pozsgai has a gross income of approximately $20,000 a year, no savings, and a negative net worth, information in the probation report and acknowledged by the Court, the Court nevertheless fined Petitioner $200,000, ($5,000 for each of the 40 counts), and imposed a mandatory assessment of $2,000 for the Crime Victims Fund ($50 for each of the 40 counts). The Probation Report (erroneously concluding that such fines were mandatory) stated that such a fine would "financially devastate" Petitioner and his family. This fine, approximately 1,000 percent of Petitioner's gross income, was the *largest* fine ever imposed in the history of the United States by severalfold on an individual for an environmental crime, or, for that matter, for most other crimes.[4]

Contrary to the request by the government, however, the trial court did not order that the defendant be taken immediately into custody. Instead, bail was continued pending appeal because the court found that the "alleged failure by the government to prove: (1) that the streams to which the wetlands at issue were adjacent are tributaries of the Pennsylvania Canal; and

---

[4] Fines are not imposed in over 68 percent of all federal crimes. In the 30 percent of the cases that fines are imposed, the average fine levied (including restitution) is approximately $8,000, with the median being only $525. U.S. Sentencing Commission, *Annual Report* 34 (1988).

(2) that the Pennsylvania Canal is a "water of the United States" raises a substantial question of law or fact likely to result in reversal," an issue which neither the district court nor the court of appeals has given any inkling as to why it lacks merit (App. 12a).

On appeal, Petitioner made a number of substantial arguments as to why the conviction should be overturned or, in the alternative, why the case should be remanded for resentencing, including 1) the total failure of the government to offer any evidence, let alone prove beyond a reasonable doubt, the jurisdictional element of the offense, 2) that Petitioner's activity was authorized by the Corps' Nationwide Permit No. 26, 3) that Petitioner did not discharge "pollutants" as defined in the Clean Water Act, 4) that the district court misapplied the Sentencing Guidelines or that § 2Q1.3 of the Guidelines was unlawfully promulgated, 5) that the sentence and fine were otherwise excessive.

On January 12, 1990, a panel of the United States Court of Appeals for the Third Circuit, without holding any oral argument and without stating any reasons for its decision, issued a Judgment Order summarily affirming the judgment of conviction and the sentence (App. 1a). On January 26, 1990, a timely petition for rehearing and suggestion for rehearing *en banc* was filed, which was denied on February 8, 1990 (App. 15a).

REASONS FOR GRANTING THE PETITION

Because this case and numerous other "wetland" cases around the country deal with the authority of the federal government to regulate, and in some cases take, private property protected under the Constitution, it is especially important that this Court, as protector of such freedoms, ensure that the federal government not over-

flow the channels of its jurisdictional boundaries. This is especially so where, as here, substantial liberty interests are also at stake. Unfortunately, the courts below abandoned their role in this respect, and did so without leaving a clue as to why. For that key reason, this Court should take particular care to review this case.

As for the Sentencing Guideline Issue, this Court, having ruled in *Mistretta v. United States*, 109 S.Ct. 649 (1989), that Congress could delegate power to the U.S. Sentencing Commission to set Sentencing Guidelines should now decide whether the U.S. Sentencing Commission followed the mandate of Congress in promulgating a category of those Guidelines, *i.e.*, Section 2Q1.3.

I. THE PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE GOVERNMENT FAILED TO INTRODUCE EVIDENCE AND PROVE THAT PETITIONER'S PROPERTY CONSTITUTED "WATERS OF THE UNITED STATES," AS DEFINED BY 33 C.F.R. § 328.3(a)(1).

Petitioner was charged with and convicted for "discharg[ing]" certain "pollutants" into certain "navigable waters" of the United States. 33 U.S.C. § 1319(c)(1); § 1362(12). "Navigable waters" is defined in the statute without further explanation as simply "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The U.S. Army Corps of Engineers regulation, 33 C.F.R. § 328.3(a), defines "waters of the United States", in pertinent part, as "(a)(1) All *waters which* are currently used, or *were used* in the past, or may be susceptible to use *in interstate or foreign commerce*,. . . [and] (5) *[t]ributaries* of waters identified in paragraphs (a)(1) through (4) of this section . . . [and] (7) [w]*et-*

lands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section. *Id.* (emphasis added).

Accordingly, the indictment charged Petitioner with placing fill onto "wetlands" "adjacent" to an "unnamed tributary of the Pennsylvania Canal" which is alleged to be a "water of the United States as defined . . . 33 C.F.R. § 328.3(a)(1)." *See* Indictment, Count One, ¶¶ 2-4 (emphasis added) (R-134). Consequently, in order for the Corps to have jurisdiction, the Government was required to prove beyond a resonable doubt: (1) that the Pennsylvania Canal is a "water of the United States" which is or was used in "interstate commerce" under § 328.3(a)(1), and that (2) the small stream which runs through and along the eastern edge of the site and thus adjacent to Petitioner's property is a "tributary" of that waterbody.

In his opening statement to the jury, the prosecutor recognized that these were "important" elements of the crime:

> SETH WEBER: *You will hear* that on that property that Mr. Pozsgai finally bought in June of 1987, there is a small stream which is also going to be referred to in testimony, I believe as a tributary.
>
> A tributary is a small body of water that *leads into* a larger body of water.
>
> This small stream on Mr. Pozsgai's property *led into* what is called the Pennsylvania canal.
>
> *You will hear* about the Pennsylvania canal.

> A little bit of the history of the Pennsylvania canal, *how it was used for the boats to go up and down the canal to transport things in interstate commerce* and things of that nature.
>
> *That becomes important in the case.*

(App. 134-35) (emphasis added).

Petitioner agrees with the government that these are "important" elements of the offense. Failure to prove them beyond a reasonable doubt is fatal. Yet the prosecutor's opening statement was the first and last time the jury heard anything about the stream leading into the Pennsylvania Canal, or the canal being used in interstate commerce. Opening statements, of course, are not evidence in a case.

As required by this Court's teachings, the government was required as a matter of due process to introduce evidence and prove beyond a reasonable doubt each of these jurisdictional elements of the offense. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Glasser v. United States*, 315 U.S. 60 (1942); *In Re Winship*, 397 U.S. 358, 364 (1970) ("Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

1. The government points to no testimony where any of its witnesses were asked whether the tiny stream on Petitioner's property led into the Pennsylvania Canal. The Canal is located a good distance from the site and separated from it by, *inter alia*, a four-lane major highway and a lumber yard.

On appeal, the government tried to plug this fatal gap in its case by arguing that "On the issue *of adjacency*, the government introduced exhibits showing the relationship between the Pozsgai site and the unnamed tributary *flowing through* the site. Government Exhs. 1 and 7 (aerial photographs). Govt. Br. 27 (emphasis added).

However, "adjacency" was *not* an issue in this case. The question is not whether the stream flows *through* the site, but rather where does it flow *to*. Does it flow into the Pennsylvania Canal? Does it flow into another stream that is not a "water of the United States"? Does it simply seep into the ground and therefore is not a tributary of anything? Where was the testimony on this issue that the prosecutor promised the jury in his opening statement?

a. Realizing the complete absence of any testimony on this key jurisdictional element of the offense, the government desparately tried to use demonstrative evidence to shore up its case by unequivocally asserting "These Exhibits [Govt. Exhs. 1 and 7 (aerial photographs)] also show that the stream *flows into* the Pennsylvania Canal." Govt. Br. 27. (emphasis added). The panel below, assuming it examined these two aerial photographs, likely misapprehended this evidence since the photographs do *not* show *any* stream, let alone the one on petitioner's property, flowing into the canal.[5]

---

[5] When counsel for Petitioner, who was not his trial counsel, first went to examine these photographs on the day after being served with the government's appellate brief, he discovered that these two aerial photographs were inexplicably missing from the custody of the deputy clerk. They were finally returned to the clerk by the government after all the appellate briefs were filed in

(continued...)

At least without the assistance of an expert in aerial photography to decipher the maps, or testimony by someone on the ground who traced the stream, a jury would be merely speculating about which of the many fuzzy dark lines on the photograph is the stream in question, and whether that stream flows from Petitioner's property into the Pennsylvania Canal.

Even the government's witness who was merely describing the stream on the property for the purposes of showing adjacency, pointed to the aerial photograph [Govt. Exh. 7] and told the jury, "*You can't see it* [the stream] exactly on this." (Testimony of Mr. Claffey) Govt. Br. 27. Surely, if the jury cannot see the stream on Petitioner's property on this aerial photograph, it would be entirely speculative for the jury to determine if, how, and where that stream flows into the Pennsylvania Canal. While we admit that the Pennsylvania Canal is depicted on the photographs as a government witness stated by a "dark line," there is no other "dark line" connected to it from *any* discernible point, and

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[5](...continued)
this case.

The Justice Department attorney who authored the appellate brief admitted to petitioner's counsel that he did not examine the aerial photographs when he made the unequivocal statement, in the government's brief to the court of appeals that the photographs show the stream on Mr. Pozsgai's property "flow[ing] into" the Pennsylvania Canal. Rather, he claimed to rely on the prosecutor's recollectiion of what the photographs depicted from the trial a year ago. This sudden recollection on the part of the prosecutor is surprising, since he made no such claim shortly after the trial in response to the defendant's assertion in his Motion for Judgment of Acquittal, when, presumably, his recollection was fresher.

certainly no dark line from Petitioner's property, located some distance away.[6]

To sustain the conviction, the court below had to conclude that a lay jury, by simply looking at the photographs without the aid of testimony, could find beyond a reasonable doubt that the stream on Petitioner's property flows into the Pennsylvania Canal. Clearly, no reasonable jury could do so. This issue is not one of witness credibility on which the trier of fact is given substantial deference.

On the contrary, "sufficiency of the evidence is a question of law subject to *de novo* review. . . . We owe no special deference to the district court on this issue." *See United States v. Kelly*, 888 F.2d 732 (11th Cir. 1989). At best, the government might argue that these two aerial photographs constitute a modicum of evidence (which they are not) to prove that the stream is a tributary of the Pennsylvania Canal. However, a "'mere modicum' of evidence, making the existence of an element of the crime slightly more probable than it would be without the evidence, by itself is not sufficient." *United States v. Marolda*, 648 F.2d 623, 624 (9th Cir. 1981), *citing Jackson v. Virginia*, 443 U.S. 307, 320 (1979). As the *Jackson* Court stated, "it could not seriously be argued that such a 'modicum' of evidence

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[6] Lest there be any question about this point, appended are reproductions of Government Exhibits 1 and 7 (taken in March 1985 and April 1987, respectively) (App. 40a). Each of the two aerial photographs are approximately 24 by 35 inches in size and were taken by the government at different elevations. In order to reproduce them in this brief, they are first reduced to show the entire exhibit. The revelant portion of each photograph showing Petitioner's property and the Pennsylvania Canal are then reproduced in the same dimension as the jury saw them. Dark ink lines outlining part of the tract are the delineations of the "wetland" made by the government's witness.

could by itself rationally support a conviction beyond a reasonable doubt." 443 U.S. at 320. Surely, it is not asking too much of the government that before it sends Petitioner to prison for three years for placing topsoil and fill on his own property and exacts fines of over $200,000, the prosecutor make good on his promise (and legal duty) to present testimony on a "important" element of the offense, especially where the fact at issue is one that is objectively determinable.

2. Clearly, the government also failed to prove that the Pennsylvania Canal was or is used in interstate commerce. 33 C.F.R. § 328.3(a)(1). While the prosecutor promised the jury they would hear testimony about the history of the Pennsylvania Canal and its alleged prior use in interstate commerce, none was forthcoming.

On appeal, the government tried to shore up this fatal gap in its case by cavalierly concluding in a footnote: "It cannot be seriously disputed that the Pennsylvania Canal is a navigable waterway within the meaning of 33 C.F.R. § 328.3(a)(1). A canal is defined as 'an artificial waterway for navigation *or* for draining *or* irrigating land.' Webster's Seventh New Collegiate Dictionary." Govt. Br. 27, n.19 (emphasis added).

This dictionary definition is not merely insufficient evidence, it is no evidence at all. In the first place, the definition relied upon by the government is phrased in the double disjunctive, so that the word "canal" could mean an artificial waterway used for draining purposes but be *incapable* of supporting any actual navigation. In any event, 33 C.F.R. § 328.3(a)(1) requires proof that the canal is or has been used in "interstate or foreign commerce." Thus, the *Pennsylvania* Canal, even if used for navigation, could reasonably be understood as

having been so used in *intrastate*, rather than interstate commerce. The trial court did *not* take judicial notice that the Pennsylvania Canal was used in interstate commerce, nor did the government make any request that it should. The prosecutor simply reneged on his promise to the jury that they would hear historical testimony to prove this "important" element of the offense.[7]

The court below was required to reverse the conviction unless it found that "there is substantial evidence... to support a jury's finding of guilt beyond a reasonable doubt..." *Government of Virgin Islands v. Williams*, 739 F.2d 936, 940 (3d Cir. 1984). Clearly, the evidence in this case to prove the government's jurisdiction over Petitioner's property, a crucial element of the crime is, as a matter of law, insufficient under the Due Process Clause to support a verdict of guilty beyond a reasonable doubt.

If the government must prove impacts on interstate commerce when prosecuting racketeers and other such criminals (see *United States v. Jannotti*, 673 F.2d 578 (3d Cir. 1982)), surely it must do so when prosecuting its citizens for placing clean fill on their own property.

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[7] In *United States v. Commodore Club, Inc.*, 418 F. Supp. 311 (E.D. Mich. 1976), the defendants were criminally prosecuted for violating the Rivers and Harbor Act for failing to have permit for filling in "a navigable water." The court found that while the evidence to prove this essential element may be sufficient if it were a civil case, it noted that "this case is presented to the Court in the criminal context,"; accordingly, "this Court will not entertain such a presumption in a criminal prosecution. The Government was required to prove beyond a reasonable doubt that the filled area [was a navigable water] and this it failed to do." 418 F. Supp. at 318, 322.

II. THE GOVERNMENT DID NOT PROVE THAT PETITIONER DISCHARGED "POLLUTANTS" "INTO WATER" AS DEFINED IN 33 U.S.C. § 1362(6).

This is an important issue of statutory construction which goes to the heart of the case as to whether "pollutants" were discharged, assuming the property in question was a "water of the United States." Even if the Court does not grant review of this issue, the discussion presented here nevertheless relates to Questions 3 and 4 by underscoring how far afield from the core offense conduct prohibited by the Clean Water Act were Petitioner's so-called water pollution activities.

The quintessential element of each of the 40 counts that the government had to prove beyond a reasonable doubt was that the Petitioner discharged certain "pollutants" defined in 33 U.S.C. § 1362(6) as follows:

> (6) The term "pollutant" *means* dredged spoil, solid waste, incinerator residue, . . . discharged *into water* (emphasis added).

The term "pollutant" is thus defined in terms of specific substances being discharged "*into water*" The law is clear and unambiguous. It does *not* say into "waters of the United States" or "navigable waters" or "wetlands" or "moist soil" or "dry land that the Corps determines to be water," but "water" as that term is commonly understood to mean the liquid state of H_2O.[8] The definition also uses the prepositional phrase "*into*

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[8] "Water" is defined as "the liquid of which seas, lakes, and rivers are composed and which falls as rain and issues from springs. When pure it is transparent, colourless (except as seen in large quantity, when it has a blue tint), tasteless and odourless." 2 Oxford English Dictionary 3701 (Compact Ed. 1971).

water," not "near water" or "*onto* wetlands." *Cf. United States v. GAF Corporation*, 389 F. Supp. 1379, 1383 (S.D. Tex. 1975) ("discharge of a pollutant" does not include discharge into subsurface wells).[9]

The government dismissed this argument in its brief below as an "innovative reading of the Act" contrary to the intent of Congress and case authority. Govt. Br. 32. Petitioner sees nothing "innovative" about interpreting the word "water" to mean "water". What is "innovative" is the government's strained reading of the statute, namely, that placing "earth" on other earth constitutes a discharge of "pollutants into water."[10] Petitioner's reading of the law is entirely consistent with the intent of the Congress that enacted the Clean *Water* Act. That intent can best be discerned from the language Congress employed.

It is a cardinal principal of statutory construction that the language chosen by the Congress be given its plain meaning. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *TVA v. Hill*, 437 U.S. 153 (1978). This rule is particularly adhered to in criminal cases. *United States v. Enmons*, 410 U.S. 396, 411 (1973) ("This being a criminal statute, it must be strictly construed, and any ambiguity resolved in favor of

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[9] The trial court erroneously instructed the jury on this key element of the offense by stating, "The third element [of the offense] is that the defendant discharged pollutants. The term, pollutant, means spoils, solid waste, rocks, sand, cellar dirt and industrial waste discharged into *wetlands*." Tr. 12/30/88 Judge Katz 79-80 (emphasis added).

[10] Even the Corps of Engineers seems to acknowledge this distinction by defining "fill material" as "*not* includ[ing] any pollutant discharged *into* the *water* primarily to dispose of waste, as that activity is regulated [by the EPA] under section 402 of the Clean Water Act." 33 C.F.R. § 323.2(e) (emphasis added).

lenity.") *See also United States v. Standard Brewery*, 251 U.S. 210 (1920) (Administrative rulings cannot add to an Act of Congress and make conduct criminal which that law leaves untouched). Neither the Corps of Engineers nor the EPA has any other regulatory definition of the term "pollutants" or "water." Accordingly, interpreting the word "into water" to mean exactly that, is the only permissible judicial construction of the word. In *Amoco Production Co. v. Village of Gambell, Alaska*, 107 S. Ct. 1396, 1405 (1987), this Court unanimously rejected the Ninth Circuit's opinion that the term "in Alaska" should be construed "in a general, 'nontechnical' sense to mean the geographic region of Alaska, including the Outer Continental Shelf." There is nothing ambiguous about the phrase "into water" and therefore the phrase should be given its plain and ordinary meaning. *See United States v. Locke*, 471 U.S. 84 (1985) (statutory phrase requiring mining claims to be file "prior to December 31" required rejection of claims filed on December 31). Neither the EPA nor the Corps has any regulatory definition of "pollutant" different from the one enacted by Congress; accordingly, the plain meaning of the statute controls.

Interpreting "water" as liquid water is certainly in keeping with Congress' intent to regulate the discharge of pollutants into our nation's territorial seas, bays, lakes, ponds, reservoirs, rivers, and streams, and even familiar wetlands such as swamps, bayous, everglades, and marshes which usually contain surface water.[11]

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[11] When interpreting a statute for criminal purposes, there is a "long established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity." *Dunn v. United States*, 442 U.S. 100, 112 (1979), and this the lower court failed to do. *Enmons, supra; United States v. Braverman*, 373 U.S. 405, 408 (1963); *United States v. Moore*, 613 F.2d 1029, 1043 (D.C. Cir.

(continued...)

In any event, the Corps is free to promulgate a regulation interpreting the phrase "into water." *See Tabb Lakes, Ltd. v. United States*, No. 89-2905 (4th Cir. Sept. 19, 1989) (attempt by Corps to regulate certain wetlands because they are used by migratory birds such as robins is struck down since such jurisdictional coverage must be specified in regulations promulgated under the Administrative Procedures Act). Of course, the Congress can, and should, address this issue as well. In the meantime, "no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." *Public Employees Retirement System of Ohio v. Betts*, 109 S.Ct 2854, 2863 (1989).

III. SECTION 2Q1.3 OF THE SENTENCING GUIDELINES IS UNLAWFUL AS PROMULGATED OR AS APPLIED IN THIS CASE.

The Sentencing Reform Act of 1984, generally, 18 U.S.C. §§ 3551 through 3742, and 28 U.S.C. §§ 991 through 998, was enacted as a part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II (Oct 12, 1984), to reform the federal sentencing system. The essential premise behind the Sentencing Reform Act was that sentencing under past law, which granted judges broad discretion, resulted in a fragmented sentencing system characterized by unwarranted disparity and a lack of fairness. The issue of unwarranted disparity in sentencing was of paramount importance in

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[11](...continued)
1979), cert. denied 446 U.S. 954 (1980). *See also* Blackstone *Commentaries* 88 (1765) (citing 1 Edw VI, c. 12(1547) (law making it a crime to steal "horses" will not support conviction of a person who stole only one horse).

the passage of the Sentencing Reform Act, as revealed in the report of the Senate Judiciary Committee on the Crime Control Act of 1983, S. Rep. No. 225, 98th Cong., 1st Sess. 37-190 (1983), reprinted in 1984 U.S. Code Cong. and Ad. News 3182, 3220-3373.

It is undisputed that the 27-month prison sentence imposed on Petitioner, if upheld, will be the longest prison term served by anyone for any environmental violation, including those involving the deliberate dumping of toxic and hazardous wastes. Close behind him is 58-year-old Ocie Mills and his son, now serving 21 months for placing 19 loads of clean sand on his half-acre lot in Florida. *United States v. Mills*, No. 88-03100-01/WEA (N.D. Fla. 1989), *appeal pending* (11th Cir. no. 89-3325). The criminal disposition of each individual environmental pollution case in fiscal years 1983-1989 show that the usual sentence for real polluters was a modest fine and probation. Actual incarceration was reserved for the most serious offenders, and even then involved only a short stay of a few days to several months. *No* person went to jail for the discharge of a non-toxic pollutant.[12]

Even now, the application of the guidelines is producing gross disparities. *See United States v. Bogas*, CR88-282 (N.D. Ohio, Feb. 13, 1990), *appeal by gov't dism'd*, No. 90-3228 (6th Cir. April 13, 1990) (hazardous waste polluter who lied to EPA, given 180 days home detention) Clearly, Petitioner should not have received a greater sentence than Mr. Bogas. How did the Guidelines, which were intended to reduce dispari-

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[12] *See* U.S. Environmental Protection Agency, Office of Enforcement and Compliance Activity: Summary of Criminal Prosecution Resulting from Environmental Investigations (April 1989). The summary for Fiscal Year 1985 is reproduced, *infra*, App. 30a.

ties, not create them, produce such unjust results? The basic flaw is in the drafting of § 2Q1.3 and its hazardous companion § 2Q1.2.

Petitioner was charged with discharging earth and clean fill without a permit. Under § 2Q1.3, that offense constitutes both the base offense, as well as the two specific offense characteristics of discharging a pollutant (§ 2Q1.3(b)(1))[13] and not having a permit under § 2Q1.3(4). This causes an increase of the base offense level for this regulatory offense from a score of 6 (which permits a court to impose probation) to 16, requiring imprisonment from 21 to 27 months. If this "double counting" is a correct application of the guidelines, then every discharge of clean non-toxic fill dirt without a permit will *automatically* result in a score of at least 14, and more likely 16, thereby requiring a mandatory *minimum* jail term of at least 15 months, and more likely, 21 months. This surely cannot be correct when the *maximum* jail term for the worst water polluter in the country could not by law, until 1987, have exceeded one year. Indeed, the Guidelines were already drafted (although not in effect) before the Clean Water Act was amended in early 1987--which, *inter alia*, increased the maximum penalty from 1 year to 3 years for water polluters. In fact, there are a number of environmental statutes covered under both §§ 2Q1.2 and 2Q1.3 which are misdemeanors, violation of which cannot result in more than one year in jail, yet the

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[13] The district court apparently rejected Petitioner's argument at sentencing that since § 2Q1.3(b)(1) presupposes "actual environmental contamination" according to Application Note 4, and should not be applied to Petitioner, there was no contamination. The plain meaning of § 2Q1.3(b)(1) apparently was accepted by the court. Petitioner seeks review of the possible misapplication of the Guidelines to his case.

Guidelines virtually dictate a mandatory minimum sentence of the statutory maximum for a first offender.[14]

As Petitioner argued below, § 2Q1.3 is invalid on its face and as applied in this case because 1) the Commission did not follow 28 U.S.C. § 994(m) which mandates that the Commission "ascertain the average sentences imposed" for the category of environmental offenses *before* devising a sentencing guideline for that category; 2) § 2Q1.3 clearly contravenes 28 U.S.C. § 994(f) which requires that the Guidelines "provid[e] certainty and *fairness* in sentencing and *reducing sentencing disparities*" (emphasis added); 3) § 2Q1.3 contravenes 28 U.S.C. § 994(j) which requires that the guidelines "reflect the general appropriateness of imposing a sentence *other than imprisonment* in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense" (emphasis added); and 4) the Guidelines are inconsistent with the purposes of sentencing described in 18 U.S.C. § 3553. While courts can depart from the Guidelines, they can do so only if it is clear that the Commission did not consider unusual mitigating or aggravating circumstances. § 5K2.0. On their face, the Guidelines do appear to account for various offense factors; however, the Commission did not exercise its independent judgment in establishing them. The fundamental flaw with these Guidelines is that the Sentencing Commission did not follow Congress' mandate by reviewing past sentencing practices in order to determine "average sentences imposed in [each] category of cases" [28 U.S.C. § 1994(m)] as

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[14] *See United States v. Fisher*, CR 89-234 (D. Ore. Feb. 12, 1990) (Guidelines called for a 21-month sentence when statutory maximum for negligent discharge under 33 U.S.C. § 1319(c)(1)(A) was one year).

their starting point before the Commission was to exercise its independent judgment about whether to depart from such past practice. In short, the Commission failed to do its homework.

The source material used by the Commission in determining past sentencing practices was a 1,279 page report of some 40,000 sentences imposed from January 1, 1984 to February 28, 1985 prepared by The Federal Judicial Center in 1986. *Punishments Imposed on Federal Offenders* (Federal Judicial Center 1986) The categories covered are Crimes of Violence, Property Offenses, Drug Offenses, Offenses Involving The Justice System, Firearms and Explosives Offenses, Immigration and Citizenship Offenses, Miscellaneous Offenses, and Corporate Crime. *Id.* Conspicuously absent from this report is any historical information on sentences and fines imposed for criminal violations of the Clean Water Act or the host of other environmental laws on the books.[15] In short, the Commission did not exercise its considered judgment in passing on these guidelines. If the Commission had examined and analyzed the dispositions of the environmental pollution cases from fiscal years 1983-1989 (which was submitted to the court of appeals), it would have concluded that the usual sentence was a modest fine, probation, and in some cases, restoration, even for persistent violators who ignored agency warnings. *Id.*

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[15] The only environmentally related category of sentences in the Miscellaneous Offense area is the killing or smuggling of endangered or protected animals or plants. There were 208 offenders in this category, and § 2Q2.1 fairly tracks the average sentences that were imposed in this category. *Id.* at 8-85. *But see United States v. Van Fossan*, 1990 U.S. App. LEXIS 5247 (7th Cir. Apr. 9, 1990).

The gross disparities between these typical sentences and the instant case are striking enough, but when one considers that before the Guidelines, a person was eligible for parole after serving one-third of his sentence, the Guideline sentence of 27 months imposed here is equivalent to a staggering sentence of *81 months*, almost 7 years, a plainly unreasonable sentence where the maximum statutory sentence was only 1 year. *See, e.g, United States v. Marathon Development Corp.*, 867 F.2d 96 (1st Cir. 1989)(experienced developer given 6-month suspended sentence and fined $10,000 for filling in 5 acres of wetlands after being warned). The *Marathon* case was the first criminal prosecution of a wetlands case.

Indeed, it was Congress' clear intent that "for the most part the average time served should be similar to that served today in like cases." S. Rep. No. 225, *supra* at 116. That intent was clearly disregarded by the Commission in promulgating § 2Q1.3.

The Commission neither has identified in any of its literature what historical data it had used in developing these particular Guidelines nor given any reasons why it substantially departed from past sentencing practice in this area.[16]

In *United States v. Lee*, 887 F.2d 888 (8th Cir. 1989), the court invalidated the application of section

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[16] Commission Policy is that "when departures [from pre-Guideline sentencing practice] are substantial, the reasons for departure will be specified." Paragraph 6, Principles Governing the Redrafting of the Preliminary Guidelines, adopted December 16, 1986, reprinted in S. Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 50 (1988). See also, *id.* at 17 (Guidelines primarily to be based on "typical, or average, actual past practice").

2J1.6 of the Guidelines because it is "not sufficiently reasonable and violates the statutory mandate given to the Sentencing Commission" by producing overly harsh and unreasonable results. *Id.* at 892. Analogizing the Commission to a regulatory agency, the standard of review is whether the Guidelines are "sufficiently reasonable" in light of the congressional directive given to the Sentencing Commission. *Id.* at 890, *citing FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981). *See also Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984).

However, when the statute, as here, clearly commands the agency to undertake certain studies before promulgating regulations, and the agency's own policy requires it to articulate reasons for departing from the data in establishing the regulation, the courts are required to set aside the regulations when the agency has done neither. Recently, the U.S. Court of Appeals for the District of Columbia Circuit reviewed whether the EPA had properly followed Congressional directives in setting certain emission levels and determining whether they were stringent enough. When it found the record to be barren, the court said, "We cannot sustain [agency] action merely on the basis of interpretive theories that the agency *might have adopted* and findings that (perhaps) it *might have made*." *Environmental Defense Fund, Inc. v. EPA*, No. 88-1882, 1990 U.S. App. LEXIS 3796 (D.C. Cir. March 13, 1990) (emphasis added). Accordingly, the § 2Q1.3 must be invalidated either on its face or as applied as not following the dictates of Congress.

Not only does § 2Q1.3 produce wide sentencing disparities among environmental offenses, it also produces dramatic departure from the sentences that are currently being imposed under the Guidelines for plainly

more serious offenses as drug dealing, arson, and other major crimes.[17]

Clearly, § 2Q1.3 was promulgated and applied in violation of 28 U.S.C. § 994(f), which requires that the guidelines particularly provide for "certainty and fairness in sentencing and reducing unwarranted sentence disparities." In addition, § 994(j) requires that the guidelines are to "reflect the general appropriateness of imposing a sentence *other than imprisonment* in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense" (emphasis added). The presentence report indicated that this was not a serious offense, and indeed, the judge did not even focus on the seriousness of the *offense*. Rather, the court and the prosecutor focused on the *offender*, indicating that Petitioner, who

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[17] *Compare* Petitioner's Crime: Placing Topsoil and Fill on His Own Property: Prison Sentence: 27 months, no probation (§ 2Q1.2, level 16, range 21-27 mos.) *with* Arsonist who endangered the safety of another person (§ 2K1.4:level 10 = 6-12 months with probation possible); defrauding the public up to $2 million (§ 2F1.1:level 15 = 18-24 months); drug trafficking, up to 50 grams of cocaine (about 500 pieces of crack)(§ 2D1.1:level 14 = 15-21 months); managing a crack house (§ 2D1.8: level 16 = 21-27 mos.); reckless involuntary manslaughter-driving while drugged/drunk, knowing of the risk (§ 2A1.4: level 14 = 15-21 mos.); if this were his *second* such homicide, Offender Category II would raise the sentence to only 24 mos. maximum.

Petitioner realizes that he risks inviting criticism from the government when he notes that an arsonist can receive probation whereas Petitioner receives 27 months, for as the Justice Department said in its brief below, these are mixing "apples and oranges" because "arson...generally is directed at a limited number of victims, whereas the victims of [Petitioner's] environmental crimes include the public at large." Govt Br. at 38. It is truly a sad commentary that the Justice Department is of this opinion and that the only way to sentence an arsonist to a comparable prison term to Petitioner's is to charge the arsonist with violating some emission standard under the Clean Air Act.

has no prior criminal history, was a "stubborn" violator of the law. Under that theory, a stubborn jay walker might be treated more harshly than a casual mugger.

Since the Justice Department has announced its intention to use this case and others like it to bring a "reign of terror" upon environmental violators, however minor the offense, this Court should ensure that the rules they play by are lawful ones.

IV. THE SENTENCE VIOLATES THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT.

This Court has never issued a decision on the Excessive Fines Clause. It is important that this issue be settled as the government has made it a practice of seeking astronomical civil penalties and fines in many regulatory contexts, as well as creatively using the Alternative Fines Act, 18 U.S.C. 3571(b). Indeed, the government below argued that Petitioner could have been fined $2,000,000 under the Act. Govt. Br. 39, n.22.

The $200,000 fine here is plainly excessive, and amounts to economic capital punishment. It is the largest fine imposed on an individual for an environmental offense and is greater by 400 fold the median fine for all federal criminals ($525.00). For all the same reasons why the punishment is cruel and unusual, the fines are excessive. *See Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2933-34 (1989) (O'Connor and Stevens, JJ., concurring in part and dissenting in part). Considering that Mr. Pozsgai's gross income is approximately $20,000 per year, that his net income after paying the mortgage on the dumpsite he purchased, and living and business expenses leave him

with no savings, and that he has a negative net worth, the fine imposed is approximately 1,000 percent of his gross annual earnings, and an infinite amount times his net worth. By comparison, the issue in *Browning-Ferris* involved a punitive damage award, which although large, amounted to only about .50 percent of gross earnings ($6 milllion dollar award compared to total annual revenues of $1.3 billion). *Id.* at 2913.

Even if the fines were mandatory, that is no defense to the claim that the fine is nevertheless excessive as imposed. *See United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987) ("Even though the statute provides no discretion, the district court must avoid unconstitutional results by fashioning forfeiture orders that stay within constitutional bounds"). The *Busher* court held that the excessiveness of the fine or forfeiture can be judged by applying the proportionality principles of *Solem v. Helm*, 463 U.S. 277 (1983).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1640

UNITED STATES OF AMERICA

v.

JOHN POZSGAI
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Crim. No. 88-00450-01
(Honorable Marvin Katz)

Submitted January 12, 1990

Before: GIBBONS, Chief Judge, SCIRICA, Circuit Judge

and BLOCH, District Judge*

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* The Honorable Alan N. Bloch, United States District Judge for the Western District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit, that:

1. The court erroneously denied defendant's motion to set aside the verdict and enter judgment of acquittal since the government failed to prove an essential element of the offense, namely, that the site in question was a "water of the United States;"

2. Defendant's activity was authorized by a general permit issued by the Corps on a nationwide basis which does not require an individual permit;

3. The ineffective assistance of defendant's counsel at trail requires that the sentence be vacated or the judgment reversed;

4. Even assuming that the evidence was sufficient to prove that the wetlands were waters of the United States, and that the discharge was not allowable under the nationwide permit, the evidence was insufficient to prove that defendant discharged "pollutants" in violation of 33 U.S.C. § 1311;

5. The sentence imposed under the sentencing guidelines was illegal;

6. The sentence imposed for the pre-guideline counts was an abuse of discretion; and

7. The sentence and fine imposed violate the Eighth Amendment, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

BY THE COURT,

/s/ Anthony J. Scirica
Circuit Judge

Attest:

/s/Sally Mrvos
Sally Mrvos, Clerk

January 12, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

JOHN POZSGAI

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT
Case Number 88-00450

David Sauerbutts
Defendant's Attorney

THE DEFENDANT:

|_| pleaded guilty to counts(s) _____.
|x| was found guilty on count(s) one through forty-one after a plead of not guilty. For purposes of this Judgment, counts thirty-three and thirty-four are treated as a single court.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
33 U.S.C. §§ 1311(a); 1319(c)(2)(A)	Illegal discharge of pollutants	1-41

The defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence on counts 16-41 of the Indictment is imposed pursuant to the Sentencing Reform Act of 1984. The sentence on counts 1-15 of the Indictment is imposed pursuant to 33 U.S.C. Section 1319(c)(2)(A).

|_| The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).

|_| Count(s) _____(is)(are) dismissed on the motion of the United States.

|x| The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

|_| It is ordered that the defendant shall pay to the United States a special assessment of $_____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
135-32-7859

July 13, 1989
Date of Imposition of Sentence

Defendant's mailing address:
536 West Bridge Street
Morrisville, PA 19067

/s/ Marvin Katz
Signature of Judicial Officer

Marvin Katz, Judge
Name and Title of Judicial Officer

Defendant's residence address:

July 13, 1989
Date

Defendant: John Pozsgai
Case Number: 88-00450

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of three (3) years on each of courts one through fourteen and twenty-seven (27) months on each of counts sixteen through forty-one, all to be served concurrently. Sentence of imprisonment on Count Fifteen shall be suspended.

|_| The Court makes the following recommendations to the Bureau of Prisons:

|_| The defendant is remanded to the custody of the United States Marshal.

|_| The defendant shall surrender to the United States Marshal for this district,

a.m.
|_| at _____ p.m. on _____.
|_| as notified by the Marshal.

|_| The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

|_| before 2 p.m. on _____.
|_| as notified by the United States Marshal.
|_| as notified by the Probation Office.

[OMITTED]

Defendant: John Pozsgai
Case Number: 88-00450

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of one (1) year on each of counts sixteen through forty-one concurrently.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

|_| The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

Defendant: John Pozsgai Judgment-
Case Number: 88-00450 Page 4 of 6

PROBATION

The defendant is hereby placed on probation for a term of five (5) years on Count Fifteen. The term of probation shall commence when the defendant has completed his term of imprisonment.

While on probation, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution. The defendant shall comply with the following additional conditions.

The defendant shall comply with a restoration plan consistent with the Army Corps of Engineers Wetland Restoration Guidelines on such terms as the probation department determines that he is able.

Defendant: John Pozsgai Judgment-
Case Number: 88-00450 Page 5 of 6

STANDARD CONDITIONS OF SUPERVISION

[OMITTED]

Defendant: John Pozsgai Judgment-
Case Number: 88-00450 Page 6 of 6

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $202,000, consisting of a fine of $200,000 and a special assessment of $2,000.

|x| These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

A fine of $55,000 on each of counts one through forty-one and a special assessment of $50 on each of counts one through forty-one.

This sum shall be paid |_| immediately.
|x| as follows: as the probation department determines that he is able.

|_| The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

|_| The interest requirement is waived.

|_| The interest requirement is modified as follows:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	Criminal Action
v.	)	No. 88-450-1
JOHN POZSGAI	)	

TRANSCRIPT OF PROCEEDINGS

of sentence in the above-entitled action on Thursday, July 13, 1989 before the Honorable Marvin Katz, District Judge.

[p. 66]

* * *

THE DEFENDANT: Your Honor, I'm sorry what happened and I could not do better. I could not live with that and I hope you understand I did some wrong and I regret that and I'd like to have an understanding, a break so I don't have to serve time because of my family, my family who will starve if I do time and we lose everything.

MR. SOWERBUTTS: I have nothing further, Your Honor.

THE COURT: Okay. It's hard to visualize a more stubborn violator of the laws that were designed to protect the environment. I think the sentence has to take into account not only punishment for that high degree of willfulness but also serve as a deterrent to others who will doubtless be tempted by economic pres-

sure which many people, I suppose most people share to violate those laws and the deterrence has to be that if they play the lottery of the criminal justice system and are caught that the costs will be high.

The defendant is committed to the custody of the Attorney General, Bureau of Prisons to be imprisoned for a term of three years on each Courts 1 through 14 and 27 months on each of Counts 16 through 41 all to be served concurrently. Sentence of imprisonment on Count 15 is suspended. Upon release from imprisonment, the defendant shall be on supervised release for a term of one year on each of Counts 16 through 41 concurrently. On Count 15 on which I suspended sentence, defendant is placed on probation for a term of five years. The term of probation shall commence when defendant has completed his term of imprisonment. It is a condition of probation that the defendant comply with the restoration plan consistent with the Army Corps of Engineers Wetlands Restoration Guidelines on such terms as the Probation Department determines he is able. The defendant shall pay to the United States the sum of $202,000.00 consisting of a fine of $200,000.00 and a special assessment of $2,000.00.

What I'm doing by way of fine is imposing a fine of $5,000.00 on each of Counts 1 through 41 and special assessment of $50.00 on each of Counts 1 through 41.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES
OF AMERICA

CRIMINAL ACTION

v.

NO. 88-450

JOHN POZSGAI

ORDER

AND NOW, this 13th day of July, 1989, it is hereby ORDERED that bail for defendant Pozsgai is continued on its same conditions pending appeal. The court makes the following findings pursuant to 18 U.S.C. § 3143(b):

1. Defendant has proven by clear and convincing evidence that he is not likely to flee or pose a danger to the safety of any other person or the community if he is released.

2. The appeal is not for the purpose of delay.

3. The alleged failure by the government to prove: (1) that the streams to which the wetlands at issue were adjacent are tributaries of the Pennsylvania Canal; and (2) that the Pennsylvania Canal is a "water of the United States" raises a substantial question of law or fact likely to result in reversal. *See* Defendant John

Pozsgai's Memorandum of Law in Support of His Motion to Set Aside Verdict and to Enter Judgment of Acquittal.

BY THE COURT:

/s/ Marvin Katz
MARVIN KATZ, J.

7-19-89 Copy To:
S. Weber, Esq., AUSA
D. Sowerbutts, Esq.
U.S. Probation

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES
OF AMERICA

CRIMINAL ACTION

v.

NO. 88-450

JOHN POZSGAI

ORDER

AND NOW, this 27th day of January, 1989, upon consideration of Defendant John Pozsgai's Motion To Set Aside Verdict And To Enter Judgment Of Acquittal and the Government's Memorandum of Law In Opposition To Defendant's Motion To Set Aside The Verdict And To Enter Judgment of Acquittal, it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

/s/ Marvin Katz
MARVIN KATZ, J.

Dated: January 27, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1640

UNITED STATES OF AMERICA

v.

JOHN POZSGAI
Appellant

(D.C. Crim. No. 88-00450-01)

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, Chief Judge, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN and NYGAARD, Circuit Judges, BLOCH,* District Judge

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in

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*As to panel rehearing only.

regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ Anthony J. Scirica
Circuit Judge

Dated: February 8, 1990

33 USC § 1311. Effluent limitations

(a) **Illegality of pollutant discharges except in compliance with law.** Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

33 USC § 1319

(c) (2) Knowing violations. Any person who--

(A) knowingly violates section 301, 302, 306, 307, 308, 318, or 405 of this Act [33 USCS § 1311, 1312, 1316, 1318, 1328, or 1345], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 402(a)(3) or 402 (b)(8) of this Act [33 USCS § 1342(a)(3) or (b)(8)] or in a permit issued under section 404 of this Act [33 USCS § 1344] by the Secretary of the Army or by a State; or

* * *

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

33 USC § 1344. Permits for dredged or fill material

(a) **Discharge into navigable waters at specified disposal sites.** The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

* * *

(e) **General permits on State, regional, or nationwide basis.** (1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

33 USC § 1362. Definitions.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar direct and industrial, municipal, and agricultural waste discharged into water.

33 CFR § 328.3. Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce:

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

* * *

(b) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

28 USC § 991

(b) The purposes of the United States Sentencing Commission are to--

(1) establish sentencing policies and practices for the Federal criminal justice system that--

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilt of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measure the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

* * *

(b) (1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

* * *

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance--

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

* * *

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991(b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

* * *

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

* * *

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.

28 USC § 3553. Imposition of a sentence

(a) ***Factors to be considered in imposing a sentence***.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care,

or other correctional treatment in the most effective manner.

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilt of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

PART Q - OFFENSES INVOLVING THE ENVIRONMENT

* * *

§2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification

(a) Base Offense Level: 8

(b) Specific Offense Characteristics

(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide, increase by 6 levels; or

(B) if the offense otherwise involved a discharge release, or emission of a hazardous or toxic substance or pesticide, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 9 levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(4) If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by 4 levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

(6) If the offense involved a simple recordkeeping or reporting violation only, decrease by 2 levels.

Commentary

[OMITTED]

* * *

§2Q1.3. Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment, increase by 6 levels; or

(B) if the offense otherwise involved a discharge release, or emission of a pollutant, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 11 levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(4) If the offense involved a discharge without a permit or in violation of a permit, increase by 4 levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

Commentary

Statutory Provisions: 33 U.S.C. §§ 403, 406, 407, 411, 1319(c)(1), (c)(2), 1415(b), 1907, 1908; 42 U.S.C. § 7413.

Application Notes:

1. "Recordkeeping offense" includes both recordkeeping and reporting offenses. The term is to be broadly construed as including failure to report discharges, releases, or emissions where required; the giving of false information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed.

2. If the offense involved mishandling of nuclear material, apply §2M6.2 (Violation of Other Federal Atomic Energy Statutes, Rules, and Regulations) rather than this guideline.

3. The specific offense characteristics in this section assume knowing conduct. In cases involving negli-

gent conduct, a downward departure may be warranted.

4. Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual environmental contamination. A wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered. Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation a departure of up to two levels in either direction from that prescribed in these specific offense characteristics may be appropriate.

5. Subsection (b)(2) applies to offense where the public health is seriously endangered. Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. See Chapter Five, Park K (Departures).

6. Subsection (b)(3) provides an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required. Depending upon the nature of the contamination involved, a departure of up to two levels in either direction could be warranted.

7. Subsection (b)(4) applies where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required. Depending upon the nature and quantity of the substance involved and the risk associated with the

offense, a departure of up to two levels in either direction may be warranted.

8. Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).

Background: This section parallels §2Q1.2 but applies to offenses involving substances which are not pesticides and are not designated as hazardous or toxic.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 205).

Defendant(s)/ Docket No./Court	Facts and Status
Dale L. Knoedler Jim D. Newman Roger Swenson 84-00059 (D. Neb.)	Facts: Routine EPA inspection discovered facility lacked technical capability to analyze samples for fecal coliform (FC) parameters. Discharge Monitoring Reports stated "0" FC discharge; lab denied testing. Knoedler is sewage treatment technician. Newman is controller and Swenson is plant manager of Dugdale of Nebraska, Inc. 11/19/84: Five-count information filed charging Knoedler and Newman with four counts submitting false statements under Clean Water Act, Sec. 309(c)(2) [33 U.S.C. § 1319(c)(2)]. Swenson charged with one count violation of permit conditions under Clean Water Act, Secs. 301 and 309(c)(1) [33 U.S.C. §§ 1311 and 1319(c)(1)]. 12/4/84: Knoedler pled guilty to two counts violation of Clean Water Act, Sec. 309(c)(2) and sentenced to one year probation and $300 fine on each count plus court costs. 3/26/85: Five-count superseding information filed against Newman and Swenson charging Newman with four counts violating NPDES permit conditions and Swenson with one count of same violation, all under Clean Water Act, Secs. 301 and 309(c)(1) [33 U.S.C. §§ 1311 and 1319(c)(1)]. 6/3/85: On scheduled trial date, all charges against Swenson and Newman dismissed on motion by Office of United States Attorney.
George Henry Garson 85-00001 (E.D. Pa.)	Facts: Waste solvents introduced into POTW causing potential fire and explosion hazard. Garson was 71-year-old former president of Barrett Chemical Company.

	1/3/85: One-count information filed charging defendant with violation of pretreatment standards under Clean Water Act. Secs. 307 (b)(1) and 309(c)(1) [33 U.S.C. §§ 1317(b)(1) and 1319(c)(1)].
	1/5/85: Defendant pled guilty.
	1/10/85: Defendant sentenced to $2,500 fine and three years probation, including two hours per week community service during first year.
Ross L. Talbott Ross M. Talbott 85-00012 (D. Colo.)	Facts: Azinphos methyl 50W, a restricted use pesticide, applied inconsistent with labeling to apple orchard and trail park in New Castle. Failure to notify tenants and prevent re-entry for 48 hours, as required. Defendants were corporate principals of Talbott Enterprises, Inc.
	1/11/85: One-count information filed charging both defendants with violation of FIFRA, Secs. 12 and 47 [7 U.S.C. §§ 1361(b)(2) and 136j(a)(2)(G)].
	2/25/85: Both defendants pled guilty to petty offense.
	3/25/85: Ross L. Talbott sentenced to $100 fine and Ross M. Talbott fined $50.
K.W. Thompson Tool Co., Inc. (aka Thompson Center Arms) Robert Gustafson Joseph Behre Emmett Ronayne 85-08	Facts: Dumping of hazardous waste, including cyanide, barium, potassium nitrate and sodium hydroxide, into ditch emptying into Cocheco River and into ground for percolation. Casting wax containing PCBs improperly stored and no records maintained. Company is metal casting and firearms manufacturer in Rochester. Gustafson is president and Ronayne and Behre were vice presidents.

3/18/85: 50-count indictment filed charging:

Company and Ronayne - 41 counts discharge of pollutants without permit in violation of Clean Water Act, Secs. 301 and 309(c)(1) [33 U.S.C. §§ 1311 and 1319(c)()1)], three counts violating storage, marking and recordkeeping standards relating to PCBs under TSCA, Sec. 15 [15 U.S.C. § 2614], one count treatment, storage and disposal of hazardous waste without permit under RCRA, Sec. 3008(d)(2) [42 U.S.C. § 6928(d)(2)], one count failure to notify of release of hazardous waste disposal facility in violation of CERCLA, Sec. 103(c) [42 U.S.C. § 9603 (b)], one count failure to notify of existence of hazardous waste disposal facility in violation of CERCLA, Sec. 103(c) [42 U.S.C. § 9603 (c)], one count false statements in response to industrial waste questionnaire [18 U.S.C. § 1001] and two counts conspiracy to violate Clean water Act (misdemeanor) and RCRA (felony).

Behre - Charged on all same counts except false statements.

Gustafson - 41 counts violation of Clean Water Act, Secs. 301 and 309(c)(1), and three counts violation of TSCA standards.

6/24/85: Jury viewing of site conducted by Court; 6/25/85: Trial began.

7/1/85: Company entered guilty plea to 15 counts in violation of Clean Water Act, Secs. 301 and 309(c)(1), one count under CERCLA, 103(b) and one count under CERCLA, 103(c).

7/2/85: Company sentenced to $4,000 fine on each Clean Water Act count plus $7,500 of each CERCLA count for total of $75,000. Charges against individuals dismissed.

Robert Clements, Inc. 85-00069 (E.D. Va.)	Facts: Failure to notify EPA of release of hazardous substance in excess of one pound from facility in Alexandria. 4/3/85: Company entered guilty plea to one-count information filed same day charging failure to report release of hazardous substance in violation of CERCLA, Sec. 103(b) [42 U.S.C. § 9603(b)]. 4/26/85: Company sentenced to and paid $4,000 fine.
Venus Laboratories, Inc. 85-00238 (N.D. Ill.)	Facts: Liquid chemical wastes, including cleansers, drain cleaners and other cleaning agents discharged into tributary of Des Plaines River without permit. Company allowed contaminated runoff to drain into river via ditch and was believed to have hidden pipe connecting plant drains to city's storm sewers. EPA personnel observed highly contaminated water entering river. 4/17/85: 22-count indictment filed charging Company with negligent discharge of liquid chemical wastes into river without permit in violation of Clean Water Act, Secs. 301 and 309(c)(1) [33 U.S.C. §§ 1311 and 1319(c)(1)]. 8/1/85: Company entered guilty plea to four counts violation of Clean Water Act. 9/17/85: Company sentenced to $2,500 fine on each count for $10,000 total.
CSI Technologies, Inc. 85-0325 (S.D. Cal.)	Facts: Importation and distribution of specialized high voltage, high frequency capacitors containing PCBs from partner in Columbia under technical assistance contract.

	4/16/85: Seal, four-count information filed charging two felony smuggling counts [18 U.S.C. § 545] and two misdemeanor counts under TSCA, Sec. 15, for illegal distribution in commerce of capacitors containing PCBs [15 U.S.C. § 2614].
	4/18/85: Company waived indictment and pled guilty to information unsealed on this date. Company sentenced to $30,000 fine and ordered to destroy all seized capacitors.
Richard Allen Taggert Keith Egan 85-60016 (D. Or.)	Facts: False statements made to State of Oregon inspector concerning accumulation of hazardous wastes. Egan was plant manager and Taggert was plant superintendent of Evans Transportation Company.
	4/24/85: One-count information charging both defendants with one count false statements under RCRA, Sec. 3008(d)(3) [42 U.S.C. § 6928(d)(3)].
	4/30/85: Egan pled guilty to aiding and abetting making false statements under RCRA.
	5/7/85: Taggert pled guilty to making false statements under RCRA.
	6/4/85: Egan and Taggert each sentenced to $2,500 fine.
Albert Mardikian Garo Mardikian 85-00509 (C.D. Cal.)	Facts: Automobile import and emission testing facility in Orange County used mail fraud scheme to defraud EPA and Customs Service regarding importation of motor vehicles not conforming to Clean Air Act emissions standards and submittal of false test data to EPA from mid-1981 until 1984. Albert Mardikian was chief operations officer and Garo is Albert's nephew and plant manager. Agob was an employee of Albert Mardikian Engineering, Inc.

5/22/85: 35-count felony indictment charging Albert Mardikian with 17 counts mail fraud [18 U.S.C. § 1341] and 18 counts false statements [18 U.S.C. § 1001]. Garo Mardikian was charged with 10 counts of mail fraud.

8/7/85: Trail began.

8/8/85: During presentation of government's case, Albert Mardikian entered guilty plea to nine counts false statements and one count mail fraud. Garo Mardikian entered guilty plea on same date to three counts mail fraud.

Sembat Agob
85-00782
(C.D. Cal.)

8/12/85: One-count information filed charging Agob with one count false statements [18 U.S.C. § 1001]. Agob was an employee of Mardikian Engineering.

8/13/85: Agob waived indictment and pled guilty.

11/4/85: Agob sentenced to five years imprisonment (all but 20 days suspended and served on weekends), five years probation plus 2,500 hours community service.

11/25/85: Albert Mardikian sentenced to five years imprisonment (all but six months suspended), five years probation plus 2,080 hours community service consisting of at least eight hours per week over five-year period teaching under-privileged individuals how to improve job seeking skills; Albert also required to place no fewer than 20 individuals each year into jobs plus restitution to injured parties. Garo Mardikian sentenced to five years imprisonment (all but 30 days suspended and served on weekends), five years probation plus community service over five-year period.

Eric Donald Roth Sr. 85-00119 (E.D. Mo.)	Facts: Five cities paid chemical laboratory in Festus, Missouri to perform tests required by Clean Water Act permits. Laboratory owner submitted false Discharge Monitoring Reports to Missouri Department of Natural Resources. Statements of business associates indicated knowing violations. 5/23/85: 10-count indictment filed charging Roth (d/b/a Analyst Consulting Laboratories, Inc.) with three counts false statements [18 U.S.C. § 1001], two counts mail fraud [18 U.S.C. § 1342] and five misdemeanor counts of false statements under Clean Water Act, Sec. 309(c)(2) [33 U.S.C. § 1319(c)(2)]. 8/1/85: Roth pled guilty to one felony count of false statements and two misdemeanor counts of false statements. 9/6/85: Roth sentenced to four months imprisonment on each Clean Water Act count (terms to run concurrently). Sentencing on felony count suspended pending completion of five years probation and 200 hours community service.
Layton Brothers Drum Company, Inc. Willie Frank Hines 85-00174 (D. Colo.)	Facts: Storage and disposal of hazardous waste without permit, and transportation of hazardous waste via interstate highway I-70 through Eisenhower Tunnel without manifests. Oils and other liquid refuse matter channeled via earth trench into Ralston Creek without permit. Hines was Company manager. 5/23/85: 11-count indictment filed charging Company with three counts disposal of hazardous waste without permit and four counts storage of hazardous waste without permit, all in violation of RCRA, Sec. 3008(d)(2) [42 U.S.C. § 6928(d)(2)], one count false statements [18 U.S.C. § 1001], one count violation of the Rivers and Harbors Appropriation Act of 1899 (Refuse Materials Transportation Act

	(HMTA) [49 U.S.C. § 1809]. Hines charged with one count false statements. 7/12/85: Superseding information filed against same defendants charging same counts. 9/12/85: Company entered guilty plea to one count violation of Refuse Act and one count violation of HMTA. Charges against Hines dismissed. 10/24/85: Company sentenced to $10,000 fines on HMTA count and $2,000 fine for Refuse Act violation.
Frankel Manufacturing Company 85-224 (D. Colo.)	Facts: Storage of hazardous waste without permit in excess of 1,000 kilograms. 7/17/85: Company waived indictment and entered plea of guilty to information filed on same date charging one count violation of RCRA, Sec. 3008(d)(2) [42 U.S.C. § 6928 (d)(2)]. 8/30/85: Company sentenced to $200,000 fine and three years probation. First $100,000 payable in two annual installments beginning 8/30/86. Remaining $100,000 suspended if terms of probation, including cleanup and $100 assessment to Crime Victims Fund are met.
Fried Industries, Inc. 85-58 (D. N.J.)	Facts: Manufacturer of cleaning agents and detergents stored and disposed of industrial chemicals containing methylene chloride, trichloromethane, phenanthrene and bisphthalate without permit and without notification to EPA. 7/31/85: Company waived indictment and pled guilty to two-count information filed same date charging one count storage of hazardous waste without permit in violation of

RCRA, Sec. 3008(d)(2) [42 U.S.C. § 6928(d)(2)] and one count failure to notify of release of hazardous substance under CERCLA, Sec. 103(b) [42 U.S.C. § 9603(b)]. Company sentenced on same date to $40,000 fine.

Peter J. Vileisis, Jr.
Maurice Fabiani
Waterbury House Wrecking Co., Inc.
N-85-46
(D. Conn.)

Facts: Building demolition of Old Pin Shop in Oakville without notice to EPA, without removing asbestos prior to demolition and without wetting asbestos material exposed during operation. Vileisis is president of Company and Fabiani is owner of Old Pin Shop.

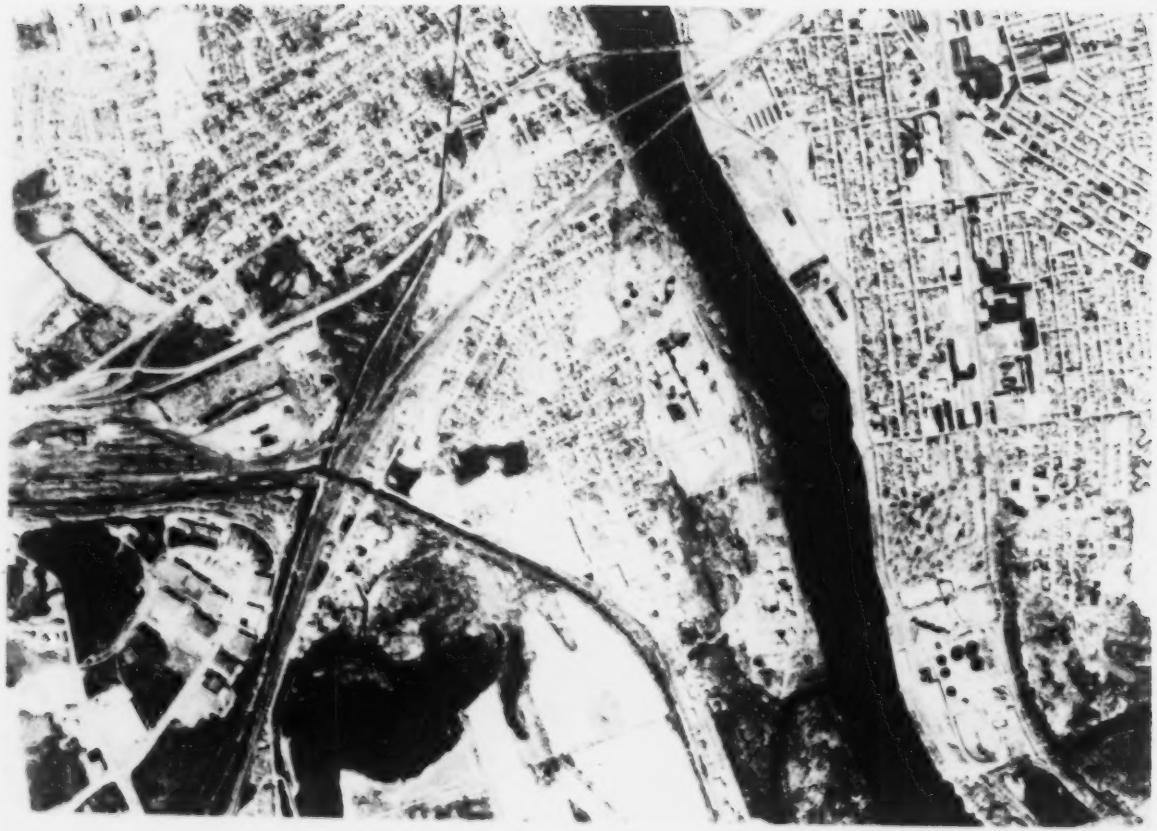
8/1/85: Five-count indictment filed charging Company and Vileisis with three counts causing asbestos emissions in violation of Clean Air Act, Secs. 113(c)(1)(C), 112(c)(1)(B) and 112(e)(5) [42 U.S.C. §§ 7413(c)(1)(C), 7412(c)(1)(B) and 7412(e)(5)] and of 40 CFR § 61.146, and Fabiani with two counts of same Clean Air Act violations.

11/4/85: Vileisis pled guilty to one count superseding information filed same date charging failure to remove asbestos prior to commencement of demolition in violation of Clean Air Act, Secs. 113(c)(1)(C), 112(c)(1)(B) and 112(e)(5) [42 U.S.C. §§ 7413(c)(1)(C), 112(c)(1)(C) and 112(e)(5)] and 40 CFR § 61.147.

11/5/85: Fabiani pled guilty in same charge in one-count superseding information filed this date.

12/19/85: Vileisis sentenced to one year suspended sentence, five years probation, $25,000 fine plus $25 penalty assessment, 1,000 hours community service and must attend, at own expense, seminars on disposal of asbestos. Fabiani sentenced to one year imprisonment (all but 30 days suspended), five years probation, $25,000 fine plus $25 penalty assessment and 1,000 hours community service.

	12/23/85: Charges dismissed against Company. 5/5/86: Old Pin Shop and Waterbury House Wrecking each placed on EPA's List of Violation Facilities under 40 CFR Part 15 resulting in ineligibility for EPA contracts, grants and loans.
Richard M. Mims 85-252 (N.D. Tex.)	Facts: Mims was former president of Brass Mill Co., a brass plating company, which directed employees to dump a dozen 55-gallon drums of toluene at L.B. Houston Nature Area. 8/20/85: One-count indictment filed charging defendant with disposal of hazardous waste without permit 3008(d)(2) [42 U.S. § 6928(d)(2)]. 8/28/85: Defendant pled guilty. 9/25/85: Defendant sentenced to two years probation and $2,500 fine payable either in lump sum or monthly installments.



POZSGAI SITE

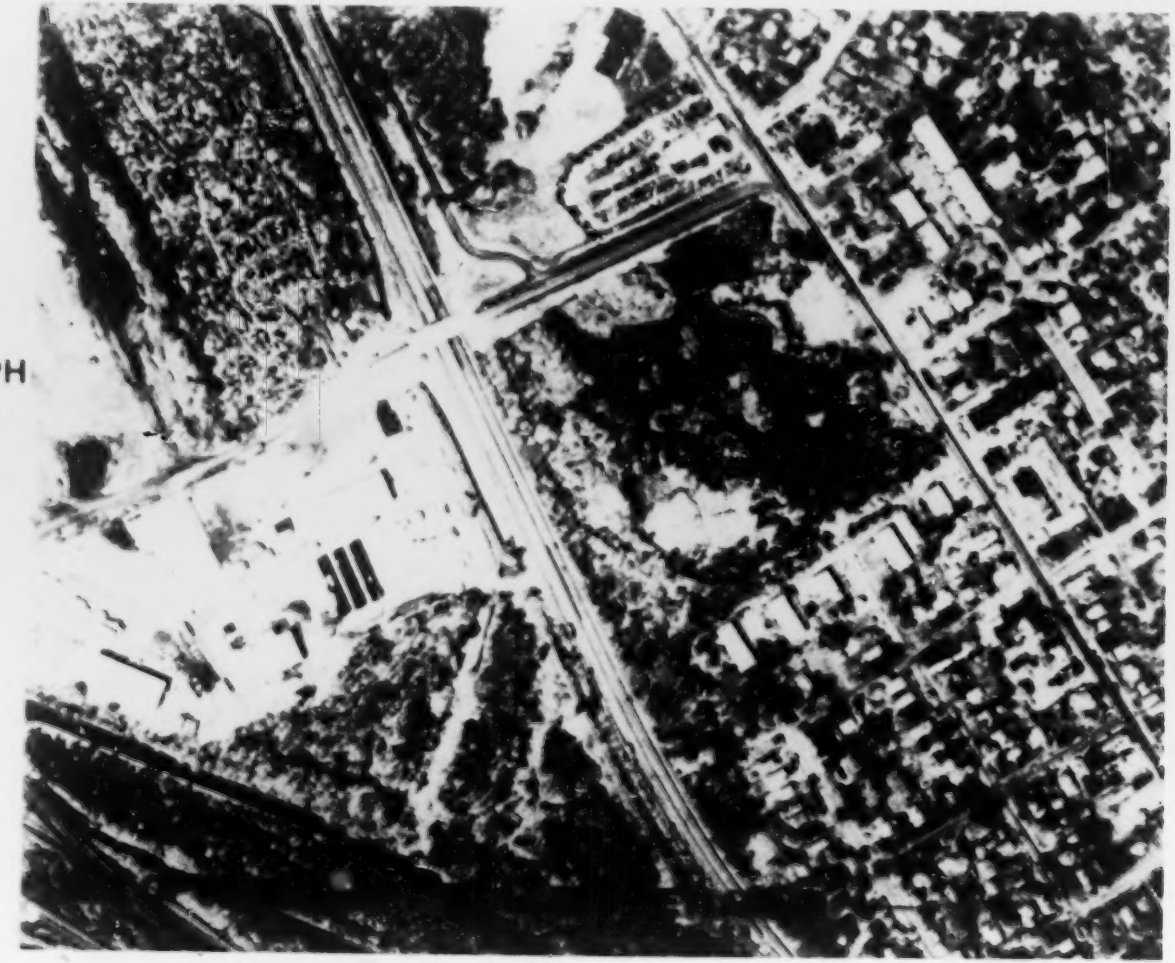
1985 AERIAL PHOTOGRAPH

TAKEN MARCH 1985

INSET OF GOVT. EXH. 1
(Pozsgai Property Top Half)

POZSGAI SITE

1987 AERIAL PHOTOGRAPH
TAKEN APRIL 14. 1987



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POZSGAI PROPERTY

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(2)

No. 89-1735

Supreme Court, U.S.
FILED
JUL 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOHN POZSGAI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's convictions for discharging pollutants onto a federally protected wetlands site without a permit, in violation of 33 U.S.C. 1311(a) and 1319(c)(2)(A).

2. Whether the Sentencing Commission exceeded its authority in promulgating Sentencing Guidelines § 2Q1.3, as applied to the offense of discharging pollutants onto a wetlands site without a permit.

3. Whether the imposition of a $200,000 fine for convictions on 40 counts of discharging pollutants onto a wetlands site without a permit violated the Excessive Fines Clause of the Eighth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1735

JOHN POZSGAI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) is unpublished, but the decision is noted at 897 F.2d 524 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1990. A petition for rehearing was denied on February 8, 1990. Pet. App. 15a-16a. The petition for a writ of certiorari was filed on May 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was con-

victed on 40 counts of discharging pollutants onto a wetlands site without a permit, in violation of 33 U.S.C. 1311(a) and 1319(c)(2)(A). He was sentenced to a total of three years' imprisonment, a five-year term of probation, a one-year term of supervised release, and a $200,000 fine. The court of appeals affirmed.

1. Under the Clean Water Act, 33 U.S.C. 1251 *et seq.*, "any discharge of dredged or fill materials into 'navigable waters'—defined as the 'waters of the United States'—is forbidden unless authorized by a permit issued by the [Army] Corps of Engineers pursuant to § 404, 33 U.S.C. § 1344." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). The term "waters of the United States" is defined in regulations promulgated under the Act to include

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce * * *;
>
> * * * * *
>
> (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
>
> * * * * *
>
> (7) Wetlands adjacent to waters * * * identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. 328.3(a). In *United States* v. *Riverside Bayview Homes, Inc., supra*, this Court upheld an earlier version of the regulations at issue in this case. The Court held it is "reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined." 474 U.S. at 133.[1]

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[1] The regulations define "wetlands" as

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wet-

Section 309 of the Clean Water Act, 33 U.S.C. 1319, establishes criminal sanctions for violations of the Act, and Section 309(c)(2), 33 U.S.C. 1319(c)(2), provides that any person found guilty of a knowing violation of the statute "shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both."

2. The evidence at trial showed that petitioner owned and operated a truck repair business in Morrisville, Pennsylvania. In the fall of 1986, petitioner decided to buy an adjoining 14-acre tract in order to expand his business. That tract was bordered by Bridge Street on the north, U.S. Route 1—a four-lane highway—on the south, a salvage yard on the west, and a tire dealership and apartment complex on the east. See Pet. 3; Pet. App. 42a (Gov't Exh. 1). A stream ran through the tract, flowing down through the property from the northeast and exiting through a culvert at the southern border. The culvert passed underneath Route 1. The Pennsylvania Canal, which ran roughly parallel to Route 1, was located nearby to the south. See Pet. 3; Pet. App. 42a (Gov't Exh. 1); Gov't C.A. Br. 6; 1 Dec. 27, 1988, Tr. 86; 1 Dec. 28, 1988, Tr. 29-30, 41; 2 Dec. 28, 1988, Tr. 77, 91; Dec. 29, 1988, Tr. 30-31, 34-35, 51-52, 145; Gov't Exhs. 9, 20; Def't Exh. 14.

While petitioner was negotiating to purchase the tract, he learned from environmental and engineering consultants that the tract met the criteria established by the Corps of Engineers for protected "wetlands" and thus that "any future development that might be considered on this site would have to be approved and reviewed by the Army Corps of Engineers." 1 Dec. 27, 1988, Tr. 73; see *id.* at

---

lands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. 328.3(b).

91-92; Gov't Exhs. 2, 3. Shortly after he began the process of purchasing the tract, however, petitioner began depositing fill material onto the tract without obtaining approval from the Corps of Engineers. In April 1987, a Corps of Engineers inspector visited petitioner at the site. The inspector's on-site investigation confirmed that the tract contained wetlands protected under federal law. As a result, the inspector warned petitioner that federal law prohibited him from continuing to deposit fill onto the land without first obtaining the necessary permits and authorization. Gov't C.A. Br. 6-7; 2 Dec. 27, 1988, Tr. 4-18.

Despite repeated warnings, petitioner continued to have truckloads of fill material—mainly construction and excavation debris—dumped onto the site. In September 1987, the Corps of Engineers notified petitioner by letter that his unauthorized filling was in violation of the Clean Water Act and directed him "to cease and desist from conducting, contracting or permitting any further filling of the wetlands or areas subject to federal jurisdiction." 2 Dec. 27, 1988, Tr. 23; Gov't Exh. 4. Petitioner ignored the notice and continued to deposit fill onto the site. After continued monitoring of petitioner's activities, the United States Environmental Protection Agency notified petitioner in early December 1987 that his "filling without a permit is a violation of the Clean Water Act" that could subject him to penal sanctions. 2 Dec. 28, 1988, Tr. 22; Gov't Exh. 18. After receiving that notice, petitioner continued the process of filling the site.

As a result, the Corps of Engineers issued petitioner a second notice of violation on December 17. That notice reiterated the earlier warnings and informed petitioner that

> [r]ecent inspections by [Corps of Engineers] personnel * * * have revealed that approximately five acres

> of additional unauthorized fill material has been placed in Federally regulated wetlands on [the tract]. Work of this nature, when conducted without a Department of the Army permit is a violation of Section 301 of the Clean Water Act.

2 Dec. 28, 1988, Tr. 16-17; Gov't Exh. 6. The notice again advised petitioner to stop his unlawful filling and instructed him to apply for a permit if he wished to resume his activities.

The filling process continued in spite of the warnings. On August 24, 1988, the United States Attorney filed a civil action against petitioner and obtained a temporary restraining order directing petitioner immediately to stop discharging fill material onto the wetlands site. Dec. 29, 1988, Tr. 79-81; Gov't Exh. 44. Over the next several weeks, however, truckloads of fill material continued to be dumped onto the site. Petitioner's discrete acts of unlawful filling of the site over a 14-month period constituted the 41 offenses charged in the indictment. Gov't CA. Br. 8-9.

3. At sentencing, the probation officer recommended a sentence of 21 to 27 months' imprisonment under the Sentencing Guidelines for the 25 counts that were subject to the Guidelines. The probation officer determined that petitioner's offense had a "total offense level" of 16: a base level of six, a six-level increase under Sentencing Guidelines § 2Q1.3(b)(1)(A) for continuous and ongoing discharging activities, and a four-level increase under Sentencing Guidelines § 2Q1.3(b)(4) for discharging without a permit. C.A. App. A35-A37. The probation officer also informed the district court that because 33 U.S.C. 1319(c)(2)(A) "calls for a mandatory minimum fine of $5,000 * * * per day of violation," petitioner faced "the minimum mandatory fine [of] $200,000" for the 40 counts of conviction. C.A. App. A38. The prosecutor agreed with the probation officer's recommendations under the

Guidelines and asked the court to impose a sentence of 27 months' imprisonment, and "the mandatory minimum fine in this case of $200,000.00." July 13, 1989, Tr. 63; see *id.* at 27.

Petitioner challenged the probation officer's calculation of the offense level. First, petitioner argued that a four-level increase under Sentencing Guidelines § 2Q1.3(b)(4) was unwarranted because the offense of conviction itself involved discharging without a permit, the punishment for which was already reflected in the base offense level of six. Second, petitioner contended that a six-level increase under Sentencing Guidelines § 2Q1.3(b)(1)(A) was inappropriate because the criminal conduct at issue—failure to obtain a permit for discharging fill—was not the sort of "ongoing, continuous" activity covered by that Guideline. July 13, 1989, Tr. 7-11.

The district court rejected petitioner's arguments and agreed with the probation officer's recommendations under the Sentencing Guidelines. July 13, 1989, Tr. 20-21, 25-26. Stating that "[i]t's hard to visualize a more stubborn violator of the laws that were designed to protect the environment," *id.* at 66, the court sentenced petitioner to a three-year term of imprisonment on Counts 1-14 (the pre-Guidelines counts), a concurrent term of 27 months' imprisonment on Counts 16-41 (the counts governed by the Guidelines), a five-year term of probation on Count 15, and a one-year term of supervised release on the Guidelines counts. The court also ordered petitioner to pay a fine of $5,000 on each count, for a total of $200,000, and as a condition of probation, the court ordered petitioner to comply with a restoration plan for the wetlands site. *Id.* at 67.[2]

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[2] Before the jury retired for deliberations, the government discovered that Count 33 and Count 34 were duplicative and therefore withdrew the latter. Dec. 30, 1988, Tr. 89.

4. On appeal, petitioner contended that the government had not presented sufficient evidence to show that his wetlands site was a "water[ ] of the United States," 33 U.S.C. 1362(7). In particular, he claimed that the government had failed to prove that the stream on his property was a tributary of the Pennsylvania Canal and that the Canal had the required nexus with interstate commerce. Pet. C.A. Br. 8-13; Pet. C.A. Reply Br. 1-7. Petitioner also contended that the government had failed to prove that he had discharged any "pollutant" on the site, as that term is used in 33 U.S.C. 1311(a) and 1362(6). Pet. C.A. Br. 24-27; Pet. C.A. Reply Br. 7-13.

In addition to contesting his conviction, petitioner challenged his sentence on several grounds. First, he argued that the district court erroneously applied Sentencing Guidelines § 2Q1.3(b)(1)(A) and (b)(4) to increase his offense level to 16; alternatively, he contended that if that application of the Guidelines was correct, those Guidelines were illegal. Pet. C.A. Br. 27-38; Pet. C.A. Reply Br. 16-20. Second, petitioner contended that the district court abused its discretion in imposing a term of three years' imprisonment and a substantial fine on the pre-Guidelines counts. Pet. C.A. Br. 38-41; Pet. C.A. Reply Br. 21. Third, petitioner argued that the court's sentence was so grossly disproportionate to his offense that it violated the Eighth Amendment. Pet. C.A. Br. 41-44; Pet. C.A. Reply Br. 21-25.[3]

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[3] Petitioner also claimed that he was authorized to fill his wetlands site by virtue of a "nationwide permit" issued by the Corps of Engineers under 33 U.S.C. 1344(e), Pet. C.A. Br. 13-23; Pet. C.A. Reply Br. 13-15, and that his trial counsel had rendered ineffective assistance, Pet. C.A. Br. 23-24. The court of appeals rejected those claims, Pet. App. 2a-3a, and petitioner has not sought further review of those aspects of the court of appeals' judgment.

The court of appeals summarily rejected each of petitioner's claims in an unpublished judgment order. Pet. App. 1a-3a.

ARGUMENT

1. Petitioner's principal contention (Pet. 10-21) is that the government did not present sufficient evidence to support his convictions for discharging pollutants onto a federally protected wetlands site without a permit, in violation of 33 U.S.C. 1311(a) and 1319(c)(2)(A).

a. First, petitioner claims (Pet. 10-17) that the government failed to prove that his wetlands site was a "water[ ] of the United States," 33 U.S.C. 1362(7). Therefore, he contends, he was not required to obtain a permit to discharge the fill materials he placed on the property.

The indictment alleged that petitioner's property was a federally protected wetlands under the Clean Water Act and its implementing regulations because the site was adjacent to a tributary of the Pennsylvania Canal. That Canal, the indictment alleged, was a "water of the United States" under the applicable regulations, which define "waters of the United States" as waters "which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce." C.A. App. A26. See 33 C.F.R. 328.3(a)(1), (5), and (7).

It is true that the government did not offer direct evidence that the stream on petitioner's property flowed into the Pennsylvania Canal, or that the Canal had been used in interstate commerce.[4] There was, however, evidence from which the jury could have inferred both facts. With respect to the stream's status as a "tributary" under

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[4] The prosecutor advised the jury in his opening statement that he would be offering direct evidence to establish both of those facts, but apparently because of an oversight that evidence was never introduced.

33 C.F.R. 328.3(a)(5), testimony and documentary evidence showed that the stream flowed through petitioner's tract toward the Pennsylvania Canal, which was located near the tract's southern border on the other side of Route 1—a fact pointed out by one of the government's expert witnesses. See 1 Dec. 28, 1988, Tr. 41; Pet. App. 42a (Gov't Exh. 1); Gov't Exh. 9. The stream entered petitioner's site from the northeast and exited through a culvert at the southern border that ran underneath Route 1.[5] From that evidence, the jury could reasonably infer that the stream flowed through the culvert and into the Canal just south of Route 1.[6]

With respect to the status of the Pennsylvania Canal as a waterway that was "used in the past, or may be susceptible to use in interstate or foreign commerce," 33 C.F.R. 328.3(a)(1), the photographic evidence introduced at trial showed that the Canal was a substantial waterway that obviously could have handled shipping traffic at one time. See Pet. App. 42a (Gov't Exh. 1); Pet. App. 41a; Gov't Exhs. 7, 9.[7] Consequently, the jury could reasonably infer that the Canal was "susceptible to use in interstate * * * commerce."

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[5] See Pet. 3; Pet. App. 42a (Gov't Exh. 1); Gov't C.A. Br. 6; 1 Dec. 27, 1988, Tr. 86; 1 Dec. 28, 1988, Tr. 29-30, 41; 2 Dec. 28, 1988, Tr. 91; Dec. 29, 1988, Tr. 30-31, 34-35, 51-52, 95, 145.

[6] The government's brief in the court of appeals asserted that the aerial photographs introduced at trial showed the stream flowing into the Canal. That representation, we have now determined, was inaccurate. We have examined the photographs and determined that they do not show the stream flowing into the Canal. However, the photographs would not be expected to show the intersection of the stream and Canal, since the evidence showed that the stream went underground through a 72" culvert shortly before it left petitioner's property. 2 Dec. 28, 1988, Tr. 91; Dec. 29, 1988, Tr. 95; Gov't Exh. 20.

[7] Although it was not necessary for the jury to find that the Canal had actually been used in interstate commerce, the evidence would

As a matter of historical fact, the Pennsylvania Canal was used in interstate commerce for nearly a century. The Canal, which runs for approximately 60 miles along the Delaware River, the border between Pennsylvania and New Jersey, was a shipping route between the Pennsylvania Lehigh Valley and markets in eastern Pennsylvania and southern New Jersey. The Canal opened in 1832 and was closed to active traffic in 1931. See, *e.g.*, R. McCullough & W. Leuba, *The Pennsylvania Main Line Canal* 80-82, 166-167 (1962); see generally C.P. Yoder, *Delaware Canal Journal* (1972). The Canal was designated as a National Historic Landmark in 1976. United States Army Corps of Engineers, *Preliminary Case Report for Neshaminy Water Resources Authority, Point Pleasant Diversion Project, Point Pleasant, Bucks County, Pennsylvania* § 2.1, at 7 (Mar. 19, 1982).

The Canal's status as an interstate waterway is the kind of fact that is capable of judicial notice under Federal Rule of Evidence 201, since it is "not subject to reasonable dispute in that it is * * * capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The court of appeals could properly take judicial notice of the Canal's use in interstate commerce, even though the district court did not do so. See *Government of the Canal Zone* v. *Burjan*, 596 F.2d 690, 693-694 (5th Cir. 1979); *United States* v. *Blunt*, 558 F.2d 1245, 1247 (6th Cir. 1977). For that reason as well, petitioner's jurisdictional claim fails.

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have supported such a conclusion. The photographic evidence showed that the Canal ran toward the New Jersey border, since it was established that petitioner's tract was located in Morrisville, Pennsylvania, directly across from Trenton, New Jersey. See, *e.g.*, Pet. 3; Pet. App. 42a (Gov't Exh. 1).

Apart from the evidence regarding the status of the stream as a tributary of the Canal and the use of the Canal in interstate commerce, there was direct evidence from several expert witnesses establishing that petitioner's wetlands property was federally protected and subject to Army Corps of Engineers jurisdiction under the Clean Water Act. See 1 Dec. 27, 1988, Tr. 47; 1 Dec. 28, 1988, Tr. 17-18, 44-46; see also Gov't Exhs. 4, 6, 18; 2 Dec. 28, 1988, Tr. 21-22. That evidence provided an independent basis from which the jury could have inferred that the requirements of federal jurisdiction were met. To be sure, the witnesses merely stated their conclusions that petitioner's site was subject to Army Corps of Engineers regulation; they did not explain the steps by which they had reached that conclusion. Yet, petitioner did not cross-examine the expert witnesses on that point, nor did he object to that aspect of their testimony for lack of foundation. In fact, he did not contest the presence of federal jurisdiction over the site except to argue that it did not contain "wetlands" as that term was used in the pertinent regulations. Accordingly, the jury could properly rely on the expert witnesses' conclusions that the jurisdictional requirements of the statute and the regulations were satisfied in this case.[8]

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[8] In context, the witnesses' testimony that petitioner's wetlands site was federally protected and within the jurisdiction of the Army Corps of Engineers necessarily meant that the wetlands were adjacent to a water of the United States or a tributary of such a water. 33 C.F.R. 328.3(a)(1), (5), and (7). There are only two other ways that wetlands can be within federal jurisdiction: either by being "interstate wetlands," 33 C.F.R. 328.3(a)(2), or by having a use or potential use that affects interstate commerce, 33 C.F.R. 328.3(a)(3). The photographic evidence conclusively established that petitioner's site was not an "interstate" wetlands, since it was located entirely within the Commonwealth of Pennsylvania, and the evidence regarding federal jurisdiction could not have rested on any effect on interstate com-

In sum, the record is admittedly quite thin with regard to the two elements needed to establish federal jurisdiction over the wetlands site—the physical connection between the stream and the Pennsylvania Canal, and the historical status of the Canal as a waterway used or susceptible to use in interstate commerce. Nevertheless, in our view, the record contains sufficient evidence on those issues, particularly in light of the fact that petitioner has not at any point suggested that the presence of those jurisdictional facts could have been contested.

b. Petitioner also claims (Pet. 18-21) that the government did not prove that he had discharged "pollutants" within the meaning of 33 U.S.C. 1344(a) and 1362(6), because the evidence did not show that he discharged any material into "water." The Clean Water Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source * * *." Section 502(12), 33 U.S.C. 1362(12). The Act defines "pollutant" to include "rock, sand, [and] cellar dirt." Section 502(6), 33 U.S.C. 1362(6).

As shown above, petitioner's wetlands site constituted "navigable waters" within the meaning of the Clean Water Act, and petitioner does not dispute that he was responsible for discharging material onto the site from a "point source," *i.e.*, dump trucks. See, *e.g.*, *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 922 (5th Cir. 1983). Contrary to petitioner's submission, the fill materials he used on his wetlands site—construction and excavation debris—plainly qualify as "pollutants" under the terms of the statute. See *United States* v. *Riverside*

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merce, because the witnesses who identified petitioner's property as federally protected wetlands were testifying about its physical and geographical properties, not about the use to which it was being or could be put.

Bayview Homes, Inc., 474 U.S. at 123.[9] Moreover, the record shows that petitioner repeatedly discharged those materials onto his wetlands site, namely, an "area[ ] * * * inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do[es] support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 328.3(b). See Gov't C.A. Br. 6-16. There is thus ample evidence that petitioner discharged "pollutant[s]" into "water," as those terms are used in the Clean Water Act.

2. Petitioner also contends (Pet. 21-29) that the Sentencing Commission exceeded its authority in promulgating Sentencing Guidelines § 2Q1.3, as applied to the offense of discharging pollutants onto a wetlands site without a permit. In petitioner's view, that Guideline automatically causes "double counting" (Pet. 23) of the same criminal conduct—discharging fill without a permit—that results in sentences far exceeding those previously imposed for environmental offenses.

The Sentencing Commission recognized that in light of their variety, regulatory offenses called for a particular approach under the Guidelines. As the Commission explained:

> (1) The [typical] guideline provides a low base offense level (6) aimed at * * * [a] recordkeeping or

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[9] See also *In re Alameda County Assessor's Parcel Nos. 537-801-2-4 and 537-850-9*, 672 F. Supp. 1278, 1284-1285 (N.D. Cal. 1987); *United States* v. *Larkins*, 657 F. Supp. 76, 78-79 n.2 (W.D. Ky. 1987), aff'd, 852 F.2d 189 (6th Cir. 1988), cert. denied, 109 S. Ct. 1131 (1989); *United States* v. *Tull*, 615 F. Supp. 610 (E.D. Va. 1983), aff'd, 769 F.2d 182 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); *United States* v. *Lambert*, 589 F. Supp. 366, 371 (M.D. Fla. 1984); *United States* v. *Robinson*, 570 F. Supp. 1157, 1162-1163 (M.D. Fla. 1983); *United States* v. *Bradshaw*, 541 F. Supp. 880, 882-883 (D. Md. 1981); *United States* v. *Weisman*, 489 F. Supp. 1331, 1336-1337 (M.D. Fla.), aff'd, 632 F.2d 891 (5th Cir. 1980) (Table).

> reporting offense. It gives the court the legal authority to impose a punishment ranging from probation up to six months of imprisonment.

Sentencing Guidelines ch. 1, Pt. A, para. 4(f), at 1.10. Such "recordkeeping or reporting offense[s]" merited a low base offense level because they typically involved "more technical, administratively-related offenses such as failure to keep accurate records or to provide requested information." *Ibid.*[10] Beyond those sorts of technical offenses, the Sentencing Commission prescribed (*ibid.*)

> [s]pecific offense characteristics designed to reflect substantive offenses that do occur (in respect to some regulatory offenses), or that are likely to occur, [in order to] increase the offense level.

And the Commission explained (*ibid.*) that

> [a] specific offense characteristic also provides that a recordkeeping or reporting offense that conceals a substantive offense will be treated like the substantive offense.

Under the Sentencing Guidelines, the relatively low base offense level therefore prescribes punishment only for technical regulatory violations that do not otherwise involve substantive conduct subject to regulation. The Guidelines take the defendant's substantive conduct into account through specific offense characteristics. In this case, contrary to petitioner's submission, petitioner was

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[10] The Commission also recognized that

> in the simplest of cases, the offender may have failed to fill out a form intentionally, but without knowledge or intent that substantive harm would likely follow. He might fail, for example, to keep an accurate record of toxic substance transport, but that failure may not lead, nor be likely to lead, to the release or improper treatment of any toxic substance. * * *

Sentencing Guidelines ch. 1, Pt. A, para. 4(f), at 1.10.

not convicted of slipshod recordkeeping or simply failing to obtain a necessary form. Rather, his offenses involved a continuous course of conduct of discharging pollutants onto a federally protected wetlands site without obtaining authorization from the Corps of Engineers. The Guidelines properly treated petitioner's conduct for what it was, *i.e.*, "ongoing, continuous, [and] repetitive discharge * * * of a pollutant into the environment," Sentencing Guidelines § 2Q1.3(b)(1)(A), and "discharge [of a pollutant] without a permit," Sentencing Guidelines § 2Q1.3(b)(4).

The Sentencing Commission acted well within its statutory mandate in promulgating the Guidelines that apply to environmental offenses, such as discharging pollutants onto wetlands. Congress specifically instructed the Commission to

> insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. * * *

28 U.S.C. 994(m). Congress further directed that the Commission "shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code." 28 U.S.C. 994(m).

Consequently, the Commission sought and received information from the Environmental Protection Agency

regarding past criminal prosecutions and sentencing for environmental offenses.[11] The EPA, for example, told the Commission that more stringent sentences were needed for environmental offenses and that Congress was considering making certain environmental crimes felonies, as opposed to misdemeanors. In February 1987, Congress raised the criminal penalties for intentional violations of provisions of the Clean Water Act, including discharging pollutants onto wetlands. See Water Quality Act of 1987, Pub. L. No. 100-4, Tit. III, § 312, 101 Stat. 42-43 (codified at 33 U.S.C. 1319(c)(2)). Instead of being punishable as misdemeanors, those offenses were made felonies punishable by a maximum term of three years' imprisonment.

The Commission's guidelines for environmental offenses, which became effective on November 1, 1987, properly reflected past sentencing practices and Congress's recent legislation. As the Commission explained:

> The Commission has not simply copied estimates of existing practice as revealed by the data (even though establishing offense values on this basis would help eliminate disparity, for the data represent averages). Rather, it has departed from the data at different points for various important reasons. Congressional statutes, for example, may suggest or require departure, as in the case of the new drug law that imposes increased and mandatory minimum sentences. In addition, the data may reveal inconsistencies in treatment, such as punishing economic crime less severely than other apparently equivalent behavior.

Sentencing Guidelines ch. 1, Pt. A, para. 3, at 1.4. Accordingly, the Commission did not act improperly in

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[11] Petitioner is mistaken in suggesting (Pet. 25) that the Sentencing Commission promulgated guidelines for environmental offenses without first considering past practices.

promulgating the Sentencing Guidelines that apply to environmental offenses, such as Sentencing Guidelines § 2Q1.3(b)(1)(A) and (b)(4).

4. Finally, petitioner contends (Pet. 29-30) that the district court's imposition of a total fine of $200,000 violated the Excessive Fines Clause of the Eighth Amendment. As petitioner correctly observes, "[t]his Court has never issued a decision on the Excessive Fines Clause." Pet. 29. This case is not an appropriate vehicle for addressing the scope of that constitutional provision for two reasons. First, the fine imposed on each count was at the bottom of the range prescribed by Congress. Under Section 309(c)(2) of the Clean Water Act, 33 U.S.C. 1319(c)(2), any person found guilty of an offense "shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both." Petitioner stood convicted of 40 separate violations, and thus faced a fine of up to $2,000,000. Cf. *United States* v. *Elkins*, 885 F.2d 775, 789 (11th Cir. 1989), cert. denied, 110 S. Ct. 1300 (1990). It is unlikely that Congress's judgment as to the appropriate range for fines is so badly flawed that a fine at the bottom of the prescribed range, which is only 10 percent of the statutory maximum, could be found to be constitutionally excessive.

Second, although petitioner has not raised the point here or in the courts below, the probation officer incorrectly asserted that a mandatory minimum fine was applicable. That assertion, together with the prosecutor's comments at sentencing, see July 13, 1989, Tr. 63, may have led the district court to believe that it was required to impose at least a $200,000 fine. See *id.* at 26-27 ("If I understand it correctly, then, so far as the applicable guidelines, it's * * * a fine of $200,000 to $2 million * * *."). If the court believed it was required to impose such a fine, it was mistaken.

The applicable penalty provision, 33 U.S.C. 1319(c)(2)(A), does not mandate the imposition of a fine on any single count if the court imposes a term of imprisonment on that count; the statute requires the court to impose a fine of at least $5,000 only if the court elects to impose some fine, either in place of, or in addition to, imprisonment. The Sentencing Guidelines required the imposition of some fine, subject to the court's consideration of petitioner's financial condition. Sentencing Guidelines § 5E4.2(a), (c)(1)(A), (c)(3), and (f) (1987 and 1988). Again, however, neither the statute nor the Sentencing Guidelines required a cumulative fine of at least $5,000 on each count. Assuming the district court found that petitioner was financially capable of paying some fine, it could have satisfied the requirements of both the statute and the Sentencing Guidelines by imposing a $5,000 fine on one count and not imposing any fine on any of the other counts. Instead, the district court imposed a $5,000 fine on each of the 40 counts of conviction, even though the probation officer informed the court that such a fine will "completely devastate [petitioner's] financial future, given his age and earning ability." C.A. App. A40.

Because the district court may have sentenced petitioner on the basis of the misapprehension that the court did not have the authority to impose a lesser fine, the $200,000 fine may not represent the district court's judgment as to the appropriate fine that should be imposed in this case. Under these circumstances, petitioner may challenge the fine through a collateral attack on the judgment in the district court. If the district court concludes that it imposed the original fine because of a misapprehension about its authority under the statute and the Sentencing Guidelines, the court may decide to impose a lesser fine, or no fine at all, in which case petitioner's argument under the Excessive Fines Clause will be moot. For that reason, the issue

of the amount of the fine, in light of the proper interpretation of the statute and the Sentencing Guidelines, should be raised in, and addressed by, the district court in the first instance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 89-1735

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOHN POZSGAI

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF FOR PETITIONER

In a radically different brief from the one it filed below, the respondent has now all but confessed error when it concedes that no direct evidence was introduced at trial to prove the twin jurisdictional elements of the offense; admits that it misrepresented to the court of appeals what the aerial photographs depicted when it falsely asserted below that they show the stream on petitioner's property flowing into the Pennsylvania Canal; concludes that the "record is admittedly quite thin" with respect to jurisdiction; and suggests that the trial court mistakenly imposed the $200,000 fine. Opp. 8 n.4, 9 n.6, 12, 17. Under these circumstances, where the conviction was affirmed on the basis of a misrepresentation of the only evidence as to an element of the offense, at a minimum, the judgement should be vacated and the case remanded. *See Alvarado v. United States*, 58 U.S.L.W. 3815 (June 25, 1990). Indeed, summary reversal would even be appropriate since there was no evidence of jurisdiction. Alternatively, this case is worthy of this Court's plenary review.

1. The respondent argues for the first time in this Court that despite the lack of any direct evidence, the jury could have nevertheless "reasonably infer[red]" that the stream on petitioner's property "flowed. . . into the Canal" because the stream allegedly entered a culvert near Route 1 and because the photographs show that the "Canal [is] just south of Route 1." Opp. 9. However, the photographs (Pet. App. 42a-45a) show that the Canal is still quite a distance from Route 1, being separated by a large lumber yard. Additionally, there is another dark line running directly parallel to and on the immediate south side of Route 1 which is another waterway, suggesting that petitioner's stream--if it did exit in this area as the respondent suggests--is a

tributary of that other stream (thereby defeating jurisdiction) rather than a tributary of the Pennsylvania Canal. Even more importantly, the respondent does not dispute petitioner's contention (Pet. 13) that there is no discernible dark line on the photographs leading to the Canal showing that *any* stream flows into it. No jury could conclude beyond a reasonable doubt from these photographs that the stream from petitioner's property flows into and hence, is a tributary of the Canal.

Even if the respondent is correct that on this "admittedly quite thin" record that the jury could infer this key jurisdictional fact, there is simply nothing in the record from which the jury could infer the second requisite jurisdictional element: that the Pennsylvania Canal was used for shipping in interstate commerce.

The respondent concedes that no direct evidence was introduced regarding the historical use of the Canal in interstate commerce. Nevertheless, the respondent now argues for the first time that "[A]s a matter of historical fact, the Pennsylvania Canal was used in interstate commerce" from 1832 to 1931 between "Pennsylvania Lehigh Valley and markets in eastern Pennsylvania and southern New Jersey," citing two texts which allegedly support that proposition. Opp. 10. Accordingly, respondent claims that the "court of appeals could properly take judicial notice of the Canal's use in interstate commerce, even though the district court did not do so," and implicitly suggests that were this case remanded to the court of appeals, this fatal defect in the government's case could be so cured. *Id.* This argument comes much too late. A court of appeals cannot take judicial notice in an appeal of a criminal case tried by a jury. *United States v. Jones*, 580 F.2d 219 (6th Cir. 1978) (court of appeals may not take judicial notice in criminal case that South Central Bell Telephone is a common carrier used to transmit

interstate communications).[1] Thus, the use of the historical theory of interstate commerce is foreclosed.

To salvage its case, the respondent advances an alternative theory of jurisdiction for the first time in this case, namely, that the jury could have concluded beyond a reasonable doubt that the Canal is "susceptible to use in [1] interstate . . . [2] commerce" as provided by 33 C.F.R. 328.3(a)(1), by merely gazing at the aerial photographs. This "susceptibility" theory remains just that, an unproven, unsupported theory.

To prove the shipping or "commerce" prong of this

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[1] Fed. R. Evid. 201(g) provides that "[i]n a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." Since the trial court did not take judicial notice of the historical use of the Canal, no such instruction was given the jury.

In any event, it is doubtful that the historical use of the Canal in interstate commerce can be judicially noticed by any court based upon the sources cited in the respondent's brief. To support its contention that the Canal was "a shipping route between Pennsylvania Lehigh Valley and markets in . . . southern New Jersey," and hence, used in interstate commerce, the respondent cites (Opp. 10) R. McCullough & W. Leuba, *The Pennsylvania Main Line Canal* 80-82, 166-167 (1962). Yet that source states only that the 60-mile Canal ran from Easton to Bristol, Pennsylvania, serving "almost entirely as a coal carrying link between the Lehigh Canal and the Philadelphia market." *Id.* at 80. There is no mention of any commerce or shipping routes to "southern New Jersey" or to any other state. While the source notes that some canals interlocked with canals from other states, *id.* at 81, the particular Canal *sub judice* is not listed as one of them. Respondent's other source, C.P. Yoder, *Delaware Canal Journal* (1972), is similarly bereft of any discussion of the Canal's use as a shipping route to markets in southern New Jersey. Under the pertinent provision of Fed. R. Evid. 201(b), a trial court can take judicial notice of only those facts "capable of *accurate and ready determination* by resort to sources whose accuracy cannot reasonably be questioned." *Id.* (emphasis added). The respondent's sources hardly qualify as ones from which an "accurate and ready determination" can be made as to this Canal's use as an *interstate* waterway.

theory of jurisdiction, the respondent makes the preposterous claim that a jury could "reasonably infer that the Canal" is susceptible to use in interstate commerce because the "photographic evidence . . . showed that the Canal was a *substantial waterway* that *obviously* could have handled *shipping traffic* at one time," Opp. 9 (emphasis added), and therefore, could handle such traffic tomorrow. There is nothing "obvious" about it at all. The Canal is depicted on the aerial photographs as a thin dark line (not to be confused with the Delaware River, which is spanned by three bridges; Pet. App. 41a), hardly a "substantial waterway." And even if the jury could conclude from the perceived width of the Canal in the photograph that it was a "substantial waterway," that says nothing about the waterway's capability for handling shipping traffic. *See, e.g., Nebraska v. Wyoming*, 325 U.S. 589, 591, 593 (1945) (North Platte River, a substantial waterway, is a "non-navigable stream" which is "sometimes characterized as a river 'two miles wide and one inch deep.'").

To prove the second prong of the "susceptibility" theory of jurisdiction, *i.e.*, that the Canal is susceptible to interstate as opposed to intrastate commerce, the respondent argues that the jury could find that the Canal "had actually been used in interstate commerce" merely because one of the aerial photographs (Gov't Exh. 1; Pet. 41a) shows that the Canal "ran toward the New Jersey border" (Opp. 9 n.7). This contention is not only more farfetched than the argument for the first prong of this theory, but it is also fictional since the respondent's historical materials say nothing about any New Jersey shipping routes along this Canal.

Assume that before the trial began in this case, the petitioner had stipulated to all the elements of the offense except jurisdiction. If one were to accept respondent's argument, its entire case would have consisted of introducing the photographs into evidence

with a witness declaring, "This is the Pennsylvania Canal." To suggest that a jury could find *beyond a reasonable doubt* from that tidbit of "evidence" that the Canal is susceptible to use in interstate commerce is nothing short of wishful thinking.[2]

In a final act of desperation to try to come up with *something* to fill the jurisdictional void in its case, the respondent invents yet a third theory, namely, that the mere testimony by two federal employees who qualified as experts in determining wetland characteristics of the site (one of whom admitted that he never set foot on petitioner's property, 1 Dec. 27, 1988, Tr. 32) and who suggested that sites which have such wetland characteristics are federally protected, is legally sufficient evidence to prove the two jurisdictional elements of the offense. This novel "*ipse dixit*" theory of jurisdiction, which was not raised in the court of appeals, clearly lacks merit. The burden is on the government to prove all elements of the offense beyond a reasonable doubt.[3]

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[2] The Canal's "susceptibility" of use as a navigable waterway in interstate commerce is, in any event, a fanciful concept. The southern portion of the Canal has restricted water flow due to the collapse in 1950 of certain old aqueducts and the complete disappearance near Bristol of Locks Nos. 1, 2 and 3, the tidal basin (which has been filled in for a parking lot) and the tide lock. *See* C.P. Yoder, *Delaware Canal Journal* 235 (1972). Just east of petitioner's property where Route 1 intersects the Canal (Pet. App. 41a), the Canal is filled in completely where concrete beams support the Route 1 overpass. Under these circumstances, a court may take judicial notice that certain waterbodies once navigable but long closed to navigation are *not* "susceptible" to commercial traffic. *See Smith v. Hustler, Inc.*, 514 F. Supp. 1265, 1268-69 (W.D. La. 1981); *Loving v. Alexander*, 745 F.2d 861 (4th Cir. 1984).

[3] In context, these witnesses were testifying as to whether the site meets the federal definition of wetlands under 33 C.F.R. 328.3(b), not whether such wetlands fall within federal jurisdiction

(continued...)

In sum, the evidence is not merely "quite thin" on the jurisdictional elements of the offense, as even the government characterizes its own case, the evidence is simply not there. Any conclusion by the jury regarding jurisdiction, assuming it even made one, would not be based on the sufficiency of the evidence, but on rank speculation. This case is thus appropriate for summary disposition on the merits under Sup. Ct. R. 16.1.

2. Even if the evidence were sufficient to establish federal jurisdiction over petitioner's site, the petition raises an important and fundamental question that has nationwide impact: the meaning of the word "pollutant" as defined in the Clean Water Act, 33 U.S.C. 1362(6). In its opposition, the respondent does not dispute the importance of this issue; rather, the respondent makes a feeble attempt to argue on the merits that the discharge of topsoil and fill material onto wetlands constitutes a discharge of "pollutants" into "water" "as those terms are used in the Clean Water Act." Opp at 13. However, "pollutant" is defined in the Act as "dredged spoil, . . . rock, sand, cellar dirt . . . discharged *into water*." 33 U.S.C. 1362(6) (emphasis added). Not surprisingly, the respondent conveniently truncates the statutory definition of "pollutant" by omitting the key phrase "into water." Opp. 12.[4]

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[3](...continued)
under 33 C.F.R. 328.3(a). Respondent's claim that it necessarily had jurisdiction over the site because federal witnesses were testifying is consistent with the Corps of Engineers' penchant for regulating all wetlands regardless of whether jurisdiction exists. *See, e.g., Tabb Lakes, Ltd. v. United States*, No. 89-2905 (4th Cir. 1989); Brief of *Amici Curiae* Fercom Aquaculture, Inc., et al.

[4]It is true that another statutory phrase, "discharge of a pollutant," is defined as "any addition of any pollutant to navigable waters from any point source" and that this Court in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) upheld a (continued...)

The respondent cites no legislative history or agency regulation that is contrary to petitioner's position.[5] Because this is a pure (and simple) question of law involving the plain meaning of a term of common usage which has not been otherwise defined by any agency regulation, questions of deference to agency expertise are not implicated. The Court should resolve this issue not only because the respondent's position is so contrary to this Court's teachings on statutory interpretation, but also because the Corps of Engineers and the EPA have begun a nationwide campaign of regulating even "dry" wetlands. *See* Brief *Amici Curiae* of Fercom Aquaculture, et al.

3. The respondent does not dispute the importance of the Sentencing Guideline issue presented in this case. Nor does respondent deny that the draconian sentence imposed here is not only grossly disproportionate to pre-Guideline sentences for environmental offenses, but also to post-Guideline cases as well (including some sentences for arson, drug dealing, and other serious crimes), a result contrary to the intent of Congress which enacted the Sentencing Reform Act of 1984. (Pet. 22-29). Instead, respondent argues on the merits that nothing is amiss with Section 2Q1.3 of the Guidelines

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[4](...continued)
portion of a Corps regulations extending the definition of "navigable waters" to include certain wetlands. Nevertheless, the phrase "discharge of a pollutant" is still defined in terms of the word "pollutant" which in turn has only one statutory meaning, namely, certain substances discharged "into water," not "navigable waters" or "wetlands."

[5] The handful of district court cases cited by the respondent for the proposition that certain fill materials discharged into wetlands constitute "pollutants" under the Act, Opp. 13 n.9, are hardly persuasive authority, especially since none of the parties or the courts in those cases raised or addressed the "into water" portion of the definition, the precise question presented here.

that produces a 27-month sentence--the longest in U.S. history for *any* environmental crime--where the "crime" consisted of petitioner allowing topsoil and clean non-toxic, non-hazardous fill to be placed on his own property and where not a single fish, bird, or sea lion was killed, harmed, or threatened, and where indeed, the water in the stream adjacent to the site runs clearer today due to petitioner's clean-up efforts.[6]

In response to petitioner's argument that the environmental Guidelines are structurally flawed because they double-count both the base offense level and the aggravating factors, the respondent contends that the Commission's rationale was to have the base offense level for regulatory crimes "aimed at . . . recordkeeping or reporting offense[s]." Opp. 14, *citing* Sentencing Guidelines ch. 1, Pt. A, para. 4(f), at 1.9. Yet the Commission goes on to explain that the "*same failure* [to keep records or file reports] * * * may have led to substantive harm," warranting the addition of points to the base level. *Id.* (emphasis added). If this is the logic of the sentencing scheme for regulatory offenses, it was quickly abandoned here. For as the respondent correctly notes, "petitioner was not convicted of slipshod recordkeeping or failing to obtain [or file] a necessary form." Opp. 14-15. Thus, petitioner was given 6 base offense points at the outset for what the Commission intended to be a "recordkeeping or reporting" violation when petitioner was never charged, nor could he be, with such a violation. He was then assigned 6 more

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[6] As former U.S. Sentencing Commissioner Michael Block aptly put it, "People who are filling up ditches on their own land may now end up in federal prison for 27 months. These people may be guilty of something, but it isn't a heinous crime." *Reason*, May 1990 at 41. For reasons that have never been explained by respondent, the Corps of Engineers never issued any formal cease and desist order to petitioner, which, pursuant to their own regulations, would have warned him of the potential penalties. Pet. 5 n.3.

points for discharging a "pollutant" and 4 more for not having a permit, for a total of 16 points. Yet these two aggravating factors make up the totality of the "crime." No other Guideline category is structured in this bizarre manner which produces unduly harsh sentences.[7]

Despite Congress' intent that the Guidelines should allow a court the option of imposing probation for minor non-violent offenses committed by first offenders, respondent speculates that in drafting § 2Q1.3, the Commission responded to Congress' February 1987 increase of the maximum sentence under the Clean Water Act. Opp. 16. This is an unlikely scenario as the draft Guidelines were issued in January 1987. The respondent also speculates that the Commission responded to the EPA which allegedly "told the Commission that more stringent sentences were needed for environmental offenses." *Id.* While the respondent claims that

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[7] *See* Sentencing Guideline Part D-3 **Offenses Involving Drugs-Regulatory Violations**, Section 2D3.1 "Illegal Use of Registration Number to Manufacture, Distribute, Acquire, or Dispense a Controlled Substance." The base offense level for this regulatory crime is 6, with *no* specific offense characteristics. This translates into a sentence of 0 to 6 months. Yet Congress made this discrete drug offense a serious felony punishable up to four years imprisonment, 21 U.S.C. 843(a) (one year *more* than the worst water polluter could ever receive under the Clean Water Act, a law which covers a wide range of conduct). On the other hand, there are environmental statutes whose statutory maximum sentences are 4 months, or one year, and the Guidelines dictate that the maximum be imposed each time, thus transforming the maximum sentence into a mandatory minimum. *See* Brief *Amicus Curiae* of Southeastern Legal Foundation; Pet. 22-24. This flawed "one size fits all" approach peculiar to environmental offenses explains the gross disparity between a probationary sentence available for core offense conduct for a serious regulatory drug offense that has a four year maximum sentence (21 U.S.C. 843(a)) and a mandatory minimum of two years or more for a minor regulatory offense such as petitioner's that is far removed from the core offense conduct of water pollution.

the Commission had some sentencing data, it has not denied petitioner's contention (Pet. 24) that the Commission failed to "ascertain the average sentences imposed" in the environmental category as required by 28 U.S.C. 994(m) before it so markedly deviated from that past sentencing practice.

The respondent's reference to the Commission's vague and generic explanation in the introduction of the Sentencing Guidelines for departing from past sentencing practices, Opp. 16, hardly suffices as a reasoned explanation for the Commission's radical departure in setting the sentences for *environmental* offenses.[8]

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 7, 1990

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[8] Inasmuch as the Sentencing Commission is not a party to this action and is within the judicial branch, the respondent's resort to speculation as to what the Commission did or did not do is understandable, unlike those cases in which it defends similar challenges to executive branch and "independent" agencies' regulations. *Cf. Geraghty v. U.S. Parole Com'n*, 719 F.2d 1199 (3d. Cir. 1983) (challenge to certain Parole Commission guidelines). Accordingly, the Court may wish to hold this question in abeyance and invite the Commission to express its views on this important issue as an *amicus curiae*.

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In The

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October Term, 1989

JOHN POZSGAI,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION AND LAND IMPROVEMENT CONTRACTORS OF AMERICA IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION AND LAND IMPROVEMENT CONTRACTORS OF AMERICA IN SUPPORT OF PETITIONER

Mountain States Legal Foundation (MSLF) and the Land Improvement Contractors of America (LICA) respectfully submit this brief *amici curiae* in support of Mr. John Pozsgai, the Petitioner for *certiorari*.[1]

[1] *Amici* have obtained the written consent of the parties to the action below, pursuant to Rule 37.2 of the Supreme Court Rules. The letters communicating such written consent have been filed with the Clerk of the Court.

INTERESTS OF *AMICI CURIAE*

Mountain States Legal Foundation is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system. Mountain States Legal Foundation has an extensive background and expertise in environmental law. The nearly 3,000 members of Mountain States Legal Foundation – from every state in the Union – are vitally interested in ensuring the protection of private property from unnecessary and excessive regulation by the U.S. Government.

The Land Improvement Contractors of America, headquartered in Maywood, Illinois, has been involved in educating contractors and landowners in soil and water conservation techniques and practices for the last forty years. LICA has a total of 5000 members residing in all states, with chapters in forty states, and sister organizations in Australia, Canada and New Zealand. LICA represents people who either own real property or are employed by owners of real properties. Such property includes land that the U.S. Department of the Army, Corps of Engineers deems to be "wetlands." LICA provides a wide range of services to its members, including the dissemination of information and consultations relating to the protection of their legal rights.

STATEMENT OF THE CASE

Amici adopt Petitioner's Statement of the Case.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW REPRESENTS A GROSS MISCARRIAGE OF JUSTICE, REPRESENTS A MASSIVE EROSION OF STATUTORY AND COMMON LAW PRINCIPLES, AND IS UNDULY HARSH IN ITS IMPACT.

The Environmental Protection Agency (EPA) and the U.S. Department of the Army, Corps of Engineers (Corps) have applied the so-called "dredge and fill" permit provisions of Section 404 of the Clean Water Act in such a manner as to transform the Clean Water Act into a wetlands protection statute. Without benefit of Congressional action – without benefit of months, if not of years, of hearings, debate, and careful consideration and deliberation regarding legislative proposals – the Executive Branch has written and is in the process of implementing its own "Wetlands Protection Act." By their actions, the EPA and the Corps have subverted the doctrine of Separation of Powers and the Founding Fathers' carefully crafted system of checks and balances. By its "wetlands policy," the Executive Branch has "enacted" and is now in the process of implementing "the law."

Recently the Executive Branch has embarked upon an aggressive program of imposing harsh, almost confiscatory civil and criminal penalties on its citizens. Americans pursuing otherwise legal business enterprises, have found themselves caught in a maze of regulatory

demands totally unconnected with the preservation of water quality. In the name of "wetlands protection," the Executive Branch has implemented an aggressive campaign against American farmers, ranchers and business people. One such campaign involves Petitioner, John Pozsgai.

In adopting the Clean Water Act Congress sought to "restore and maintain the chemical, physical, and biological integrity of the Nation's *waters*."[2] In its deliberations regarding the Clean Water Act, the Senate Committee on Public Works concluded that "Water moves in hydrologic cycles and it is essential that *discharge of pollutants* be controlled at the source."[3]

On the floor of the U.S. House of Representatives, Congressman John Dingell, a member of the Conference Committee which crafted the version of the legislative proposal which became law, stated that " . . . this new definition [of water] clearly encompasses all water bodies . . . *for water quality purposes*."[4]

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[2] 33 U.S.C. § 1251. (Emphasis added.)

[3] 2 Legislative History of the Water Pollution Control Act Amendments of 1972, at 1495. (Emphasis added.)

[4] 1 Legislative History of the Water Pollution Control Act Amendments of 1972, at 250. (Emphasis added.)

It is clear even from this cursory examination of the legislative history of the Clean Water Act that Congress sought to protect water quality not to ensure the existence of "wetlands."

Section 402 is the backbone of the Clean Water Act. As administered by EPA, it limits the types and amounts of discharge that can be released into our nation's waters.[5] Section 404 is an adjunct to this primary enforcement tool and is administered by the Corps not by EPA. It regulates, but does not necessarily prohibit, the discharge of fill materials into "navigable waters."[6] It is this latter program that has been the primary tool of the Executive Branch, not to protect the quality of our nation's "waters," but to preserve "wetlands" by preventing the placement of clean fill on private property which the Corps of Engineers considers to be "wetlands."

The Government asserts that preservation of "wetlands" is necessary to enhance water quality. Even if the Clean Water Act provided the Executive Branch the requisite authority to "enhance" water quality – rather than to prevent degradation of water quality – by prohibiting actions taken on private property, that objective has long since become lost in the Corps of Engineers' regulatory program. That is, the Executive Branch does not now seek to preserve wetlands because proposed activities involving the wetlands would degrade water quality, but simply to preserve wetlands for whatever aesthetic and

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[5] 33 U.S.C. §1342.

[6] 33 U.S.C. §1344.

intrinsic value such wetlands may possess.[7] Thus, the Corps of Engineers' Section 404 program, which originally regulated the placement of fill on wetlands as a *means* of preventing the degradation of our nation's water quality, has become the *end* by preventing the placement of any fill on "wetlands."

In the case of Petitioner, John Pozsgai, there was absolutely no degradation of the quality of the water in the tiny stream that runs adjacent to his property. In fact, the quality of the water appears to have been enhanced as a result of Petitioner's activities. This is especially the case since Petitioner removed thousands of old tires and other junk that had been discarded in the area over several decades preceding his purchase of the property. *See,* Petition for Writ of Certiorari at 4.

When a particular wetland has little, if any, value for preventing degradation of or enhancing water quality, one would expect the Corps to permit a property owner to improve his or her property by the placement of fill

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[7] To the contrary, studies discussed by the Office of Technology Assessment demonstrate that some wetlands may even degrade water quality instead of enhancing it. The Valiela study, a 1975 Massachusetts experiment, showed a 20% increase in the amount of nitrogen, a pollutant, which exited a marshland over the amount which entered the marsh. The Crisp study, conducted in 1966 in Britain, measured the net export of nitrogen and phosphorus, both recognized as pollutants, from a British peat bog – unquestionably "wetlands." The study showed a remarkable 552% increase in the amount of these pollutants exiting the peat bog over the amount entering it. *See,* Office of Technology Assessment, Congress of the United States, *OTA-2-206, Wetlands: Their Use and Regulation* (1984) ("Wetlands").

materials on "wetlands." In fact, the Corps has established the so-called Nationwide Permit program which allows *de minimis* fill of "wetlands."[8]

While the Nationwide Permit program issue is not directly before this Honorable Court, it nevertheless demonstrates both the outer edges of the Corps' jurisdiction in cases such as this, and how far afield Petitioner's conduct is from the activity which the Corps is to prevent, that is "water pollution." Under these circumstances, this Honorable Court should not allow Petitioner's harsh punishment of twenty-seven months in prison – the longest in U.S. history for any environmental offender and $200,000 fine – to go unreviewed.

The Government attempts to justify its punishment of Petitioner by claiming that there is a "conversion" of approximately 300,000 acres of wetlands per year. However, approximately 250,000 of these acres are lands which lie outside the Section 404 permitting process.[9] Thus, the vast majority of alleged wetland "conversions" are the result of lawful activities not covered by the Section 404 program, such as excavation, drainage, clearing, and the flooding of wetlands.[10] Furthermore, of the approximately 11,000 project applications filed each year under the Section 404 permitting process, less than

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[8] In fact it appears that the activities of Mr. Pozsgai met the requirements of the Nationwide Permit program since he placed fill materials on less than ten acres of his property. *See* 33 C.F.R. §330.5(a)(26).

[9] *Wetlands*, at 141.

[10] *Wetlands*, at 15.

three percent are denied.[11] In addition, other factors which affect our Nation's net loss of wetlands, including mother nature herself, account for approximately ten percent of wetland "conversion."

In any event, the figures used by the Government on alleged wetlands loss are approximately a decade old. Today valuable wetlands are already protected, especially by state laws expressly designed to protect and preserve wetlands. Thus, the loss of wetlands are certainly not attributable to the conduct of individuals like Petitioner, John Pozsgai.

Petitioner was charged with and convicted of discharging certain pollutants into certain navigable waters of the United States.[12] In this particular instance, Petitioner did not run afoul of the law as much as he ran afoul of a novel interpretation by the Corps of the term "pollutant." The expansive nature of the Corps definition of "wetlands," apparently permits it to conclude that portions of Petitioner's property constitute "navigable waters" and thus "waters of the United States."[13] However, the definition of "pollutant," requires unequivocally that the pollutant be discharged "into water."[14] Further, "water," is not defined by the statute and implementing regulations as anything other than "water." Thus, the definition of "water" cannot be expanded to include such broad terms as "waters of the United States,"

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[11] *Wetlands*, at 141.

[12] 33 U.S.C. §1319(c)(1).

[13] 33 U.S.C. §1362(7).

[14] 33 U.S.C. §1362(6).

"navigable waters," "wetlands," "inundated areas," "swamps," "marshes," or even "bogs."

Thus even if the definition of "wetlands" is expanded beyond all reason to include Petitioner's property – whose only relationship to "wetlands" is its proximity to a "trickle" that can hardly be called a "stream" – such an expansive definition cannot be used to assert that Petitioner, by placing fill on his property, was depositing that fill "into water." There is absolutely no question that Petitioner placed the fill on land, and not "into water."

Indeed, in its brief to the Third Circuit Court of Appeals, the Government was unable to set forth any legislative history or any case law to support the proposition that Congress intended a "pollutant" to be that which is discharged somewhere other than "into water." While the Government cited numerous cases addressing the definition of "pollutant" in the Clean Water Act, all of these cases recite the litany of materials described in the definition. None address the requirement that for the activity to fall within that which Congress prohibited the "pollutant" must be discharged "into water."

The definition of "pollutant" found in the Clean Water Act, and its specific use of the term "into water," is an important question of law which this Honorable Court should consider. Case law cited by the Government fails to provide the authority and support which the Government must have to have proceeded against Petitioner.[15]

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[15] *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922-925 (5th Cir. 1983); *United States v. Bradshaw*, 541 F. Supp.

(Continued on following page)

II. THE DECISION BELOW REPRESENTS A REAL AND INTOLERABLE CONFLICT WITH A DECISION OF THIS HONORABLE COURT.

In *U.S. v. Riverside Bayview Homes*, this Honorable Court addressed only the authority of the Corps to regulate discharges of fill material into wetlands which are "adjacent to *bodies of open water.*"[16] This Honorable Court expressly reserved judgment as to the ability of the Corps to regulate wetlands *not* adjacent to bodies of open water. *Id.* The instant petition brings before this Honorable Court the issue of the extent to which the Corps may regulate "wetlands" not adjacent to bodies of open water.

As Judge Merritt aptly points out in his concurrence in *U.S. v. Larkins*, 852 F.2d 189, 193 (6th Cir. 1988), the Corps' definition has detached the "wetlands" jurisdiction of the Corps from any concept of open or navigable waters. As an example, Judge Merritt points to a farmer's low-lying farmland or a homeowner's low-lying backyard – adjacent to a small stream or creek but miles from any navigable waterway.

Judge Merritt raises a significant issue related to the case at bar by questioning the definition to be applied to the "bodies of open water" concept. Thus, is the test for determining the presence of a body of open water the

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(Continued from previous page)

880, 882-883 (D. Md. 1981); *United States v. Weisman*, 489 F. Supp. 1331, 1337 (M.D. Fla. 1980); *United States v. Robinson*, 570 F. Supp. 1157, 1162-1163 (D. Fla. 1983).

[16] 474 U.S. 121, 131 n.8 (1985). (Emphasis added.)

same as the traditional navigability test? Or do bodies of open water include tiny intermittent streams or drainage ditches?

Petitioner's property is adjacent to a tiny stream which is hardly a "body of open water" and indeed is far removed from any river, bay, lake or similar body of open water. It is difficult to imagine how the Corps could attempt to assert jurisdiction over the activities of Petitioner. The petition should be granted.

CONCLUSION

The cruel, callous, and pitiless treatment of Petitioner by the United States Government is more than simply federal action far out of proportion to the violations alleged against him. The U.S. Government, without Congressional authority, has embarked upon a "wetlands preservation program" for which it has absolutely no authority. In fact, the interpretations of law which the U.S. Government requires to proceed against Petitioner run directly contrary, not only to the express language of statute, but to the legislative history accompanying that statute.

If John Pozsgai's petition is not granted, more than a great injustice will have been committed against a man who came to America from behind the Iron Curtain seeking liberty; the Executive Branch will have been granted the permission of this Honorable Court to make law, not simply to enforce it.

We urge this Honorable Court to grant the petition.

Respectfully submitted,

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BRIEF AMICI CURIAE OF FERCOM AQUACULTURE CORPORATION, RICKY LEE MCGOWN, JAMES ALLEN MOSELEY AND MARY ANN MOSELEY IN SUPPORT OF PETITIONER

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With the written consent of all parties, FERCOM Aquaculture Corporation, Ricky Lee McGown, and James Allen and Mary Ann Moseley respectfully submit this brief as *Amici curiae*. *Amici* have filed the consents of the parties with the Clerk of the Court.

Amici curiae, FERCOM Aquaculture Corporation, Ricky Lee McGown, and James Allen and Mary Ann Moseley, pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

INTEREST OF AMICI CURIAE

Amici curiae are a company and individuals who have been aggrieved by the actions of United States Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") in connection with those agencies' unprecedented attempts to gain control of *amici's* dry, solid-ground property under the guise of enforcing the anti-water pollution provisions of the Clean Water Act ("CWA"), §§33 U.S.C. 1251-1376.

FERCOM Aquaculture Corporation ("FERCOM") is a Missouri company engaged in the business of raising certain aquaculture products, primarily catfish, in farm ponds it has constructed in areas which previously consisted mainly of cultivated corn and soybean fields. In August, 1989, the Corps and EPA asserted CWA jurisdiction over these cultivated fields and claimed that the construction of catfish ponds in the fields constituted a violation of the CWA. Ironically, the government claimed that FERCOM was destroying the government's "valuable wetlands" (i.e., the corn and bean fields) by building water thereon. In September, 1989, FERCOM responded by bringing an action for a declaratory judgment, *FERCOM Aquaculture Corporation v. United States, et al.*, Cause No. N89-0116-C (E.D.Mo.), seeking a declaration that the Corps/EPA have no CWA jurisdiction over FERCOM's dry, solid-ground property. The government responded by filing and vigorously briefing a Motion to Dismiss (now pending), contending that FERCOM has no right to bring such a suit and that FERCOM's sole redress must be to wait until the government brings an enforcement action against it; the government claims that then, and only then, can FERCOM assert lack of jurisdiction.

Similarly, in August, 1989, *amicus* Rick McGown filed a declaratory judgment action, *McGown v. United States, et al.*, Cause No. N89-0103-C (E.D.Mo.), seeking a judicial declaration that the Corps/EPA have no jurisdiction over his farm fields. McGown filed his action only after extensively, but unsuccessfully, attempting to negotiate for a "§404 permit" (which was unnecessary in the first place) with the Corps/EPA in order to repair his half-century old levee along a small

creek and to relocate/construct the levee in an area landward of its former location. Using so-called "§404 mitigation" as a device more akin to "economic extortion," the Corps/EPA refused to give Mr. McGown a §404 permit unless he would "set aside" for the government one-fourth of his 255 acres of farm property. Only after a year-and-a-half of "running the 404 permitting gauntlet," and after having been repeatedly called a "flagrant and multiple violator" of the CWA, did Mr. McGown file his action seeking judicial intervention. As is the case in *FERCOM*, the government responded by vigorously attempting to have Mr. McGown's case dismissed — contending that he too has no remedy but to sit and wait for the government to bring an enforcement action against him.

Three business days after Mr. McGown filed his lawsuit, the government brought an action against Mr. McGown's neighbors, *amici* Moseleys, (*United States v. James Allen and Mary Ann Moseley*, Cause No. N89-0107-C (E.D.Mo.)), claiming that the construction of a levee in the Moseley's farm fields located near a small creek constituted an act of water pollution. Consequently, the Moseleys also find themselves embroiled in litigation with the Corps/EPA, revolving largely around the question of whether their dry, solid-ground soybean fields are "navigable waters" subject to regulation by the Corps/EPA.

All three of the above mentioned cases arise from the Corps/EPA's rapidly evolving "land-grab" strategy. The issues before this Court in Pozsgai have nationwide significance to *amici* and other farmers, landowners, contractors, and developers across the country — especially in light of the recent attempts by the Corps/EPA to capitalize on a bottomless environmental pork-barrel by drastically expanding their regulatory jurisdiction (without notice and comment to the public) far beyond the scope of the CWA and the boundaries of the United States Constitution.

Amici are all engaged in farming activities in the heartland of America. Farming has long been recognized as the backbone of this nation:

> Whenever there are in any country uncultivated lands and unemployed poor it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for men to labor and live on . . . . The small landowners are the most precious part of the State.

T. Jefferson, *Writings*, Vol. XIX, p. 17. As stated by Daniel Webster: "Let us never forget that the cultivation of the earth is the most important labor of man." D. Webster, *Remarks on Agriculture*, Boston, 13 Jan., 1840. It is noteworthy that the policies the Corps/EPA would impose on our citizens are also not without historical precedent: "All taxes must, at last, fall upon agriculture." E. Gibbon, *Decline and Fall of the Roman Empire*, Ch. 8. As demonstrated herein, the implications of the *Pozsgai* case far transcend Mr. Pozsgai's individual situation and are indicative of problems of a nationwide magnitude — problems which make this Court's intervention necessary.

SUMMARY OF ARGUMENT

The CWA is an anti-water pollution statute. It is not a "land-use zoning act" nor is it even a "wetlands protection act." Indeed, CWA does not prohibit the "destruction" of a wetland by draining or the removal of all vegetation; however, the placement of rock, sand or certain other enumerated materials on wetlands "violate" Section 301 of the CWA. This feature of the law is significant, for Congress did not intend that the mere placement of fill on dry areas constitutes a discharge of a "pollutant" "into water." Even assuming the Corps did have jurisdiction over Mr. Pozsgai's property, the Corps and all federal agencies had already approved a nationwide permit for the fill work conducted. 33 C.F.R. §330.5(a)(26). Far from being a "raper of the public environment," Mr. Pozsgai's activities cleaned up a vacant lot/dumpsite. *See* Petition for Writ of Certiorari, pp. 3-6.

The harsh punishment imposed upon Mr. Pozsgai is, according to the lower court's admonition, intended to send a chilling message — supposedly to "environmental water polluters." The true message and practical effect of "Pozsgai justice," however, is not to warn real large-scale polluters, but to bludgeon into submission those farmers and

landowners who might otherwise oppose the government's recently energized attempts to take over their property. The combination of the agencies' long-recognized penchant for overregulation and their new attempt to expand CWA jurisdiction to regulate dry land presents an alarming dilemma to farmers, landowners, and developers. If the agencies' "bargaining position" is fortified with the threat of "*Pozsgai* justice" — it will be a rare landowner indeed who would dare to risk his freedom and economic survival in order to defend his property. Regulatory "compliance" will be little more than "capitulation" and the cost of compliance will be justice and fair play. The horrors experienced by *Amici curiae* are, unfortunately, only the tip of the iceberg of regulatory nightmares which await landowners if the agencies are allowed to continue unchecked in their emerging land-grab fervor. In light of these recently developing circumstances, *Amici curiae* respectfully submit that it is imperative that this Court review the compelling issues raised by Mr. Pozsgai.

This Court is Mr. Pozsgai's last resort to prevent injustice from occurring — injustice not limited to Mr. Pozsgai but with widespread ramifications to the "regulated public" across the country. *Amici* fully adopt and incorporate by reference all portions of Mr. Pozsgai's Petition for Writ of Certiorari, and focus primarily upon issues I and II. Amici respectfully submit that the government's failure to prove both (1) the requisite interstate commerce connection with the activity sought to be regulated, and (2) the discharge of a "pollutant" "into water" as required by the CWA — results in a conviction woven from threads far too loose and thin for hanging Mr. Pozsgai.

ARGUMENT

Introduction: "Section 404": The Government's Penchant for Overregulation

The Clean Water Act ("CWA"), which was known as the Federal Water Pollution Control Act at the time of its enactment in 1972, is a comprehensive effort by Congress to restore and maintain the "chemical, physical, and biological intregrity of the nation's waters." 33 U.S.C §1251(a). However laudatory these goals may be, the actual legal requirements are found in other sections of the law. The cornerstone of the regulatory scheme established by the CWA is Section 301, 33 U.S.C. §1311, which prohibits the discharge of "any pollutant" into "navigable waters," except when in compliance with various sections of the CWA, including section 404, 33 U.S.C. §1344. Section 404 establishes a program whereby the Corps issues permits for the "discharge of dredged and fill material." The section 404 program is somewhat of an orphaned hybrid which arose out of the combination of the historic regulation by the Corps of obstructions to navigation under the Rivers and Harbors Act of 1899, 33 U.S.C. §403, and the environmental concerns of the CWA. A troublesome shortcoming of the section 404 program is that it bears, at best, a strained relationship to the purposes of the CWA, particularly with respect to the enforcement action brought against Mr. Pozsgai. The purpose of the CWA is to protect water quality, not to regulate land use.[1]

The substance of the CWA's jurisdictional boundaries has not been altered *by Congress* since 1977. Even then, when Congress considered the 1977 amendments to section 404, it attempted to curb what many members of Congress have perceived as "the Corps' penchant for overregulation, particularly in cases of de minimus environmental concern." *1902 Atlantic, Ltd. v. Hudson*, 574 F.Supp. 1381, 1397-98 (E.D.Va. 1983). The *1902 Atlantic, Ltd.* Court's quotation from a

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[1] The CWA does not even mention the term "wetlands," and section 404 was mainly concerned with the open water disposal of dredged material. The Corps' role in operating the section 404 program emanated from its historic role in regulating obstructions in navigable waters.

colloquy during floor debate on the Senate bill (S.1952) between Senator Muskie (the Senate manager of the 1977 amendments) and Senator Bentsen is illustrative of Congress' concern for the Corps' penchant for overregulation:

> MR. BENTSEN: Mr. President . . . . *Section 404 has become a symbol to many Americans of how a well-intentioned legislative initiative can turn into a quagmire of disruption, frustration, and bureaucratic entanglement for the ranchers, farmers, foresters, and average citizens of this country.*
>
> * * *
>
> Section 404 *has become synonymous with Federal overregulation, overcontrol, cumbersome bureaucratic procedures, and a general lack of realism* . . . .
>
> * * *
>
> During Senate consideration of the conference report on the Clean Water Act of 1977, Senator Muskie, who also was one of the Senate conferees, stated that the statements made during Senate debate, such as the statements above, adequately reflect the legislative intent with respect to Section 404.

1902 Atlantic Ltd., 574 F.Supp. at 1398, n. 16 (emphasis added) *quoting* Legislative History of the Clean Water Act of 1977, Vol. 3-4, pp. 470, 901-02 (1978).

Unfortunately, despite the concerns expressed in 1977 by Senators Bentsen and Muskie, things have become worse — not better. The "penchant for overregulation" (by both the Corps and the EPA) now victimizes farmers and landowners nationwide, including amici curiae, as the Corps/EPA attempt to use the CWA to expand their

"regulatory turf" out of the water, out of the swamps and marshes, and straight onto the dry land.[2]

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[2] Recently, in *United States v. Larkins*, 852 F.2d 189 (6th Cir. 1988), cert. denied, 109 S.Ct. 1131 (1989), Circuit Judge Merritt sua sponte went out of his was to criticize the Corps' over-expansive jurisdictional approach:

> [T]he Corps has now expanded the definition of "navigable waters" to include any creek or stream or moist area . . . . "Under such a construction [as proposed by the Corps of Engineers] low lying backyards miles from a navigable waterway would become wetlands." [citation omitted]. The Corps' definition has apparently detached and untied the "wetlands" jurisdiction of the Corps from any concept of "open waters" or navigable waters. *A farmer's low lying farmland or a homeowner's low lying backyard — adjacent to a small stream or creek but many miles from any navigable waterway — has apparently been converted into government property no longer subject to control or improvement by the owner without government permission.* A statute that does not mention "wetlands" has apparently been read to include simply "moist land adjacent to a creek."
>
> The framers of the Constitution were solicitious of the rights of landowners — *especially small farmers struggling for survival* — not to have land appropriated by the government. They therefore adopted the provision of the Fifth Amendment of the Constitution prohibiting the taking of private property for public use without just compensation.

United States v. Larkins, 852 F.2d at 193 (Merritt, J., concurring) (emphasis added). (Unlike *amici's* cases, *Larkins* involved land covered in part with "knee deep water" and cypress trees, see 659 F.Supp. 76, 79, containing numerous sloughs and depressions which defendants filled, 852 F.2d at 190, and which previously "tended to be covered by standing water." *Id.* at 191.) Although this Court has held that a "taking" claim is no defense to a §404 enforcement action, *see United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985), as indicated by Judge Merritt in Larkins, it is fundamentally wrong for the government to try to seize control of its citizens' property under the pretext of enforcing an "anti-water pollution" statute. *See* Exec. Order 12630, March 15, 1988, 53 Fed. Reg. 8859, *"Governmental Actions and Interference with Constitutionally Protected Property Rights"* (directing each agency to account for Fifth Amendment "taking" concerns in carrying out actions, including regulatory and permitting functions).

1. The New Approach: Regulating Dry Land

a. The Corps' Regulations Purport to Regulate Only Truly Aquatic Areas

The new trend (i.e., regulating under §404 as if it were a "land preservation statute" instead of an "anti-water pollution statute"), stands in direct contradiction to the Corps/EPA's regulations. The agency regulations defining wetlands have remained unchanged since 1977. After defining "wetlands," the regulations then clarify the definition by stating that "[w]etlands generally include swamps, bogs, marshes, and similar areas." 33 C.F.R. §328.3(b). As stated in the preamble to the 1977 regulations, this language was included to demonstrate the intent of the Corps to include "*only* truly aquatic areas." 42 Fed.Reg. 37,129 (1977) (emphasis added).[3]

Notably, the Corps' clarifying sentence of its "wetlands definition" does *not* state that "[w]etlands generally include swamps, bogs, marshes, and corn fields, soybean fields, and vacant lots." Thus, unless corn fields, soybean fields, and vacant lots are "similar areas" to "swamps, marshes, and bogs," 33 C.F.R. §328.3(b), regulatory jurisdiction should not attach. *See Blue Cross Association v. Harris*, 622 F.2d 972, 977 (8th Cir. 1980) (under commonly accepted rules of statutory construction, if the plain language is clear in its context, it is controlling); *T. L. Hunt, Inc. v. C.I.R.*, 562 F.2d 532, 535 (8th Cir. 1977). Furthermore, the rule of *ejusdem generis* demands that "where general words follow an enumeration of specific things, the general words are read as applying only to other items akin to those specifically enumerated." *See Harrison v. P.P.G. Industries*, 446 U.S. 578, 588 (1980); *Columbia Pictures v. Professional Real Estate Investors*, 866

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[3] This was further restated by Regulatory Guidance Letter 86-9, issued August 27, 1986, by Brig. Gen. Offringa:

> Neither do we intend the definition of "wetlands" to be interpreted as extending to abnormal situations including non-aquatic areas that have aquatic vegetation. Thus, we have listed *swamps, bogs and marshes* at the end of the definition at 323.2(e) to further clarify our intent *to include only truly aquatic areas* . . . .

(RGL 86-9) (emphasis added).

F.2d 278 (9th Cir. 1989). The general words "similar areas" follow the more specific words "swamps, marshes, bogs" in the definition of wetlands contained in 33 C.F.R. §328.3. Consequently, for land to be considered a "wetland," it must be the same kind of area as a swamp, marsh, or bog. The Corps/EPA, however, have recently attempted to discard such a reading, and now would interpret the phrase "similar areas" to mean "other areas" — including cultivated farm fields and other typically non-aquatic areas.

Why the new quest to regulate dry land? A recent environmental group's publication sheds light on the Corps' motive — bureaucratic self-preservation:

> For civil engineers in general, environmental projects offer a boundless future. *For the Corps in particular they mean job security.* The day of huge new river basin projects has passed; with growing public resistance to such projects, and tightening budget constraints, the Corps could be relegated to custodian status. *Environmental engineering offers the Corps steady work, an image pure and true — and an almost bottomless pork barrel.*

Audubon, July, 1990, at 111 (emphasis added). Thus from the Corps' own self-interest arose a new Manual for making "jurisdictional calls" over supposed "wetlands."

b. The New Federal Wetlands Delineation Manual: The Tool for the Agencies' Emerging "Land-Grab" Doctrine

Encouraged by the "pork barrel" opportunities, and apparently emboldened by President Bush's 1988 pledge of "no net loss of wetlands," on January 10, 1989, the Corps, EPA, and two other agencies "jointly" published a document entitled "Federal Manual for Identifying and Delineating Jurisdictional Wetlands" (the "Manual") which sets forth "*mandatory*" technical criteria and methods for identifying and delineating jurisdictional wetlands. Formerly using a "three-parameter test" to define "wetlands," the 1989 Manual at best gives lip service to this concept. In practice, the Manual purports to

allow the Corps/EPA to remove the "wet" from "wetlands."[4] The new Manual has resulted in major substantive expansions of wetland boundaries to areas which are clearly non-aquatic. Nevertheless, in promulgating the Manual, the agencies failed to follow the notice and comment requirements set forth in the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. §553, which seek to ensure public participation, fairness, and mature consideration of rules of general application. *N.L.R.B. v. Wyman Gordan Co.*, 394 U.S. 759, 764 (1969); *see Tabb Lakes, Ltd. v. United States*, 715 F.Supp. 726, 728 (E.D.Va. 1988), *aff'd without published op.*, No. 89-2905, slip. op. at 1 (4th Cir., Sept. 19, 1989) (documents published by federal agency which purport to establish methods for delineating "wetlands" are substantive decisions which require notice and comment). *Amici* are challenging the validity of the Manual, as are others. *See Mulberry Hill Development Corp. v. United States*, Cause No. PN89-2639 (D.Md. 1989) (pending).

c. Nationwide Reaction to the Corps/EPA's "Land-Grab"

The magnitude of the concern over the Corps/EPA's wetlands regulatory expansion (and abuse) is growing nationwide. *See* Exhibit 1 hereto, New York Times, April 24, 1990: "For Farmers, Wetlands Mean a Legal Quagmire." The new Manual and the expanding regulatory policies of the agencies have recently met with sharp criticism by Congress. For example:

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[4]The Corps' earlier *guidance* manual required that an area contain wetland hydrology, hydrophytic vegetation, and hydric soils in order to constitute a wetland. Under the 1989 Manual, however, the principle focus is on whether the soil type is "hydric." If so, the Corps/EPA will *imply* the remaining two parameters (vegetation and, most significantly, hydrology). This "methodology" carries frightening implications to farmers and owners of bottomland property where almost all soils are "hydric." This is because hydric soils are formed at a glacial pace — not reflecting current conditions. As noted by one Court, the term "hydric soils" generally pertains "to the wetness condition when those layers were laid down in long-past geological history. Use of the term 'hydric soils' does not really assist in a determination of whether the root zone soil meets the requirement of the regulation." *Leslie Salt Co. v. United States*, 700 F.Supp. 476, 487 (N.D.Cal. 1989).

> Unfortunately, the current direction of our wetlands policy is progressing in ways that were never envisioned by Congress. The changes that are being attempted do not follow Congressional intent. Rules and regulations are being written by bureaucrats who believe they have long been stifled over at EPA during the past eight years, and now, giving them an inch, they are taking a mile.
>
> *The Federal Manual for Identifying and Delineating Jurisdictional Wetlands, written from within the bowels of the Interior Department makes serious changes in our definition of wetlands. These changes were never proposed or discussed before a Committee of this Congress, nor were the changes proposed in the Federal Register. This new definition substantially impacts our nation, particularly rural areas, and enhances our government's "land grab" abilities.*
>
> * * *
>
> If we want to shut down our farms — our agriculture producers, the breadbasket of the world — then, yes, include our farms and agricultural productive land. This will have a tremendous, untold effect on rural America. And if that is the case, let's talk about just compensation for the taking of privately held land. Landowners in this country deserve respect and rights that many other countries in this world do not even acknowledge. We cannot in good conscience trample one of our most basic freedoms in this country.

February 28, 1990 Testimony of Congressman Emerson before Subcommittee on Water Resources, Committee on Public Works Transportation: "Wetlands Hearing" (emphasis added).

Similarly, President Bush, who announced the "no net loss of wetlands" policy which energized the Corps/EPA to draft the Manual in question, has stated the Executive Department's concerns with the agencies' overregulation:

> We are trying to do a better job of getting these agencies to work together, *but you have zealots in various levels of the bureaucracy*. We will try very hard from the top on down to get the clarification that is needed to avoid this frustration among farmers. I am not happy with this . . . .

June/July, 1990, *Farm Journal*, p. 17 (emphasis added).

2. Impact Upon the Regulated Community

The national significance of *Pozsgai*, and the nationwide magnitude of the problem faced by farmers and landowners is heightened by the newly-energized Corps/EPA's attempts to slither out from their aquatic jurisdictional boundaries onto land which is normally dry. A revealing (and alarming) portrait of the agencies' view of their expanding jurisdiction is found in a recent EPA publication which states: "If there's not a wetland in your neighborhood, there's probably one nearby." EPA: *America's Wetlands: Our Vital Link Between Land and Water*, p. 1 (Feb., 1988). Landowners across the nation have become outraged and adamantly disagree with the agencies' claims that their dry, solid-ground constitutes "navigable water" under the CWA, and that merely moving dirt (not "cellar dirt," 33 U.S.C. §1362(6)) in a field is considered a "discharge of a pollutant into water."

Significant, and not surprising, is that many, if not most, landowners find themselves confronted with the agencies' jurisdictional claim only *after* they have already commenced work on what any reasonable person would view as a non-aquatic area. When the agencies assert jurisdiction and inform the landowner that he or she is a "violator" and a "water polluter" subject to the wide gambit of potential penalties and injunctive relief set forth in the CWA, see 33 U.S.C. §1319, the landowner is placed in a precarious position indeed. He can capitulate, face an "enforcement action," or attempt to obtain judicial declaratory relief. The agencies, however, typically capitalize on their superior bargaining position and the extreme imbalance of economic and other resources to in effect "extort mitigation" by (1) "offering the carrot" of the permit while (2) "wielding the club" of enforcement, including the threat of imprisonment, fines, costly litigation and/or "restoration" —

alternatives and risks the agencies know the unfortunate landowner can ill-afford.

a. The "Permitting Process": "Take-it-or-Leave-It"

As *amici* and numerous others nationwide have learned from bitter first-hand experience, the so-called "section 404 permitting process" essentially amounts to a "take-it-or-leave-it" proposition by the agencies. An example of the "carrot/stick" coercive tactics used by the agencies is that *amicus* McGown was informed by the Corps that if he did not go along with the Corps' mitigation demands (give up one-fourth his farm) then "you will find out just how expensive it will be [to fight the Corps]." He has.

Thus, on the one hand, the landowner can capitulate to the "no net loss" and "full restoration/mitigation" demands of the agencies. (See – February 7, 1990 Memo. of Agreement between Corps/EPA (regarding "mitigation sequencing," "no net loss," *etc.*, 1990 Fed. Reg., Vol. 55, No. 48, p. 9210)). Capitulation means that the landowner "saves his hide" but forfeits his property rights to do so.

b. Declaratory Relief: A Costly Remedy

On the other hand, having no identifiable administrative remedy under which to dispute the "jurisdictional call," *Swanson v. United States*, 600 F.Supp. 802, 805 (D.Idaho 1985), *aff'd* 789 F.2d 1368 (9th Cir. 1986), the landowner can file suit contesting jurisdiction.[5] Once in court, however, the aggrieved person will be faced with an expen-

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[5] Compare, *Leslie Salt Co. v. United States*, 660 F.Supp. 183, 185 (N.D.Cal. 1987) ("the decision on [§404] jurisdiction is to be made by the district court in a plenary trial and not by the Corps") and *United States v. Key West Towers, Inc.*, 720 F.Supp. 963, 966, n. 8 (S.D.Fla. 1989) ("a declaratory judgment action would have resolved the issue [of whether or not t he Corps had jurisdiction in the first place] . . . ."), *with Southern Pines Assoc. v. United States*, Cause No. C-89-453-N (E.D.Va. Aug. 11, 1989) (landowner's declaratory judgment action challenging CWA jurisdiction dismissed by lower court which *sua sponte* ruled that the CWA precludes pre-enforcement review), *appeal docketed*, No. 89-1790 (4th Cir. Aug. 28, 1989)

sive legal battle just to keep the suit there. It is now clear that when a landowner seeks declaratory judicial intervention, the agencies will customarily respond by vigorously fighting for dismissal on grounds that the landowner is seeking "pre-enforcement review."[6] Consequently, before even reaching the merits of the claim, the landowner's resources are drained from fighting an expensive and protracted "briefing battle" simply to keep the case in court.[7] The agencies' position in these cases — i.e., that the landowner has an adequate opportunity for review if and when the agencies bring an enforcement action against him — in reality offers absolutely no relief to the aggrieved citizen. No person in his right mind would want to face "Pozsgai charges" or even civil penalties ($25,000.00 a day) and/or injunctive relief simply to resolve a legimately disputed jurisdictional call. *See Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). In essence, the agencies' strategy is: "Resist and, we will break you." Unfortunately, if the Corps/EPA are allowed to use "Pozsgai justice" to back up their threat, they may be right.

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[6] In addition to the Motions to Dismiss in the lawsuits brought by *amici* FERCOM and McGown, *Mulberry Hill Development Corp. v. United States, et al.*, Cause No. PN89-2639 (D.Md.) is a pending case wherein the government seeks to dismiss the developer's declaratory judgment action which seeks judidical determination that its property is not wetlands; the developer is specifically challenging the 1989 Manual.

[7] Time and economic resources are always in the hand of the government. For example, amicus McGown's costs in merely trying to keep his case in court have already far surpassed his annual income — with a devastating effect on his family of five who subsist at or near the poverty level. *Amicus* FERCOM has lost over a million catfish, accompanying revenues, and reduced its work force while it has foregone further pond construction in an effort to simply try to avoid being characterized as an "environmental polluter," and while attempting to make clear that it fully intends to comply with the law — which is in itself in dispute.

3. The Agencies Overzealous Policies, Their New Attempts to Expand CWA Jurisdiction, and the Harsh Punishment Imposed on Mr. Pozsgai Requires that this Court Strictly Scrutinize the Fatal Absence of Proof in the Pozsgai Case

a. The Government Failed to Prove that Pozsgai's Property is Subject to Federal CWA Jurisdiction

As ably discussed in Mr. Pozsgai's Petition for Writ of Certiorari, pp. 10-17, the government's case is fatally flawed in that the government totally neglected to introduce any evidence of the requisite interstate commerce connection with the property which the government sought to regulate.

Even if Congress somehow intended to regulate dry property under the CWA, to do so would violate the constitutional limits on Congress' commerce clause power. While the legislative history of the CWA includes a Senate Report which "explains" that "water moves in hydrological cycles and it is essential that the discharge of pollutants be controlled at the source," S. Rep. No. 414, 92d Cong., 1st Sess. 77 (1971), Congress' power to regulate "dredge and fill" "pollution" is nevertheless constrained by its power to regulate interstate commerce. Otherwise CWA jurisdiction would be co-extensive with *rainfall*, (part of the "hydrological cycle"), extending into every backyard and lawn in suburbia. Placing a large pile of rocks/sand on dry land could hardly be called an act of "water pollution." Most would readily agree, however, that the same pile in the middle of the Everglades or in the Potomac River might affect the "waters of the United States." There must, however, be a rational basis for any congressional finding that regulated activities *substantially* affect interstate commerce and the means chosen by Congress must be reasonably adapted to the end permitted by the Constitution. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); *United States v. Darby*, 312 U.S. 100, 121 (1941); *Katzenbach v. McClung*, 379 U.S. 241, 258, 304 (1964). *See Hodel v. Virginia Surface Mining & Reclam. Ass'n.*, 452 U.S. 264, 310-311 (1981) (Rehnquist, C.J., concurring) (regulated activity must have *substantial* effect on interstate commerce). Indeed, even in this

case, the prosecution proported to predicate jurisdiction on a waterbody used in commerce over 100 years ago; but there was no proffer of any nexus to interstate commerce today. *See* Petition for Certiorari, p. 9.

b. The Government Failed to Prove that Petitioner Discharged "Pollutants" "Into Water" as Defined in the CWA

Similarly, the harsh criminal punishment imposed requires that the Court strictly scrutinize the government's wholesale failure to prove beyond a reasonable doubt that Mr. Pozsgai commited an act of "water pollution" by placing the supposed "pollutants" "*into water.*" 33 U.S.C. §1362(6). As pointed out by Mr. Pozsgai's Petition, the underlying jury instruction was erroneously at odds with §1362(6) in that it substituted the term "wetlands" in lieu of the statutory term "water." Petition for Writ of Certiorari, p. 19, n. 9.

The "cornerstone" of the CWA is 33 U.S.C. §1311(a), which simply prohibits the discharge of any "pollutant," except in accordance with provisions as established elsewhere in the CWA, including section 404. Read logically, the "permitting" established under section 404 is only necessary for the discharge of "fill materials" which are "pollutants," as defined in 33 U.S.C. §1362(6). Accordingly, Mr. Pozsgai did not need a section 404 permit to discharge "fill material" unless the "fill material" involved was a specifically enumerated "pollutant" set forth in §1362(6). Section 1362(6) lists a number of materials, otherwise innocuous, (e.g., rock, sand, *etc.*) which do not become "pollutants" until and *unless* they are placed "into water." 33 U.S.C. §1362(6).

Any claim by the government that the term "water" means "navigable waters" or "waters of the United States" should be rejected. First, as Petitioner correctly notes, no extrinsic aids are required to discern the plain meaning of the term "water," particularly in this criminal context. Second, even if legislative intent was an issue, Congress repeatedly used terms of art such as "navigable waters" and "waters of the United States" throughout the CWA. *See* U.S.C. §§1341(a), 1342(a), 1344(a), 1344(f), and 1362(7). The definitional section in question,

§1362(6), however, uses only the term "water" — and uses it four times in that paragraph. On all *four* occasions "water" is used in *singular* form and in these instances, it would seem beyond question that "water" was intended to mean H_2O in its liquid state. As demonstrated by the very next definitional paragraph, §1362(7), Congress was very much aware of the distinction between "water" and "navigable waters" or "waters of the United States," but declined to use the latter two terms in defining "pollutant."

Ironically, a contrary interpretation would result in the government being able to sustain a conviction for "water pollution" without showing that the materials were added to water. This Court should not permit Mr. Pozsgai to suffer the draconian penalties imposed by the lower court in light of the government's absence of proof on this crucial element.

CONCLUSION

Mr. Pozsgai's Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,
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APPENDIX

APPENDIX A

EXHIBIT I

The New York Times

Reprinted from The New York Times, Tuesday, April 24, 1990

For Farmer, Wetlands Means a Legal Quagmire

By WILLIAM ROBBINS

Special to The New York Times

MARCELINE, Mo. — To the casual visitor, Rick McGown's farm looks like prime cropland. And it does what good farmland should do, yielding more than 150 bushels of corn an acre last year.

To officials of the Army Corps of Engineers, however, Mr. McGown's property is quite different. Solid as it may seem, they say, it is wetland. As wetland it is part of the waters of the United States, coming under the jurisdiction of the Corps.

The New York Times/David Hutson

Army officals say Rick McGown's Missouri farmland is actually Federal waters.

Rising Pressures Seen

Between those points of view stretches a web of arguments, legal questions, claims and counterclaims involving the Clean Water Act of 1972 — a web that has now entangled farmers, environmentalists and Federal agencies in legal disputes across the country.

legal disputes across the country. What a runaway bureaucracy wants them to do, farmers say, is convert good cropland into bogs and marshland. Furthermore, they say, the Government is doing this with total disregard of property rights guaranteed under the Constitution.

Farmers say pressures from Federal environmental agencies have increased since the Bush Administration took office and adopted a policy of trying to prevent any net loss of wetlands. But they charge that while officials have been strict with small operators, those with larger resources, like corporations and big developers, have been able to circumvent Administration policy.

And some of the farmers' representatives note that the Administration recently retreated from its own policy in response to concerns of Alaskan officials, who feared that strict application of the policy would inhibit development of oil and other resources.

But Government officials insist they are simply enforcing the law that gives the Corps of Engineers authority over the waters of the United States.

"If my country needs my land for a public purpose, let them have it," Mr. McGown, a 35-year-old farmer, said not long ago as he stood looking out over his rich soil, blackened by overnight rains. "But if they are going to take it for a public purpose, let them do it in a legal way and let the public pay for it, not send individual farmers into bankruptcy by taking away what they have spent much of their lives working for."

Mr. McGown said his farm, 255 acres that is mostly the rich low-lying fields commonly known as bottom land, has never included the "swamps, bogs and marshes" that the Corps has long regarded as necessary to define a wetland. Part of the Government's case to the contrary is based on a Federal agent's discovery of a plant that the official said was typical of wetlands. "What he was calling 'cattails' was a head of grain sorghum," Mr. McGown said, referring to a common crop used for livestock feed.

His complaint, which will soon be addressed in a Federal District Court case in St. Louis, is similar to that of several other farmers.

A neighbor, Allen Moseley, has been sued in the St. Louis court by the Corps, which charged "pollution of waters of the United States" for building a levee to guard his fields against floods. The Corps has proposed a solution under which he would agree to cede half his 187 acres to Federal control for a wildlife easement, plant trees on it and pay a fine of $7,500.

"The agreement they offered me amounted to an agreement to let me hang myself," said Mr. Moseley. "If I accept their plan, I lose the farm. It's that simple, I won't have enough cropland left to pay the mortgage."

A Justice Department lawyer representing the Federal agencies in the cases said he could not comment because they were in litigation, but he provided copies of letters to Representative Trent Lott, Republican of Mississippi, on the McGown case and to Vice President Dan Quayle on the Moseley case.

Letters Cite Defiance

Both letters, signed by Morris Kay, regional administrator of the Environmental Protection Agency, asserted that the property in question involved wetlands and that the two farmers, in defiance of the Corps of Engineers, and without first obtaining permits, had performed levee-building and clearing operations violating the Clean Water Act.

The cases involving those landowners and many others are rooted in changing laws, an evolution of attitudes of the United States toward a resource that until recently was regarded as wasteland and an effort to use the Clean Water Act of 1972, an anti-pollution statute, as a device to protect the country's diminishing wetlands.

When the first Europeans arrived in America, what is now the contiguous United States had about 215 million acres of wetlands. The most recent estimates now put that at less than 100 million acres. Much of the wetlands that was converted has been used by land developers, but the biggest parts have been converted by drainage and filling for agriculture.

The New York Times/David Hutson

Rick McGown says the Army Corps of Engineers is using the Clean Water Act to take farmlands like his buit by bit by calling them wetlands and charging farmers with polluting United States waters.

It was not until the last decade or so that environmentalists were able to persuade Congress, Federal agencies and much of the general public that wetlands had valuable functions, supporting wildlife and fisheries, protecting against floods and droughts and helping clean up pollutants before they could filter into groundwater and lakes and streams. In fact, until an executive order on protection of the wetlands was issued in 1977, the Agriculture Department actively aided and subsidized drainage projects.

Section 404 of the Clean Water Act prohibits the discharge of dredged or fill materials into water without a permit from the Corps. And that restriction has been extended to property Federal agencies have defined as wetlands — even though the word wetlands never appears in the act.

"They are using the Clean Water Act to capture farmers' property."

While the act does contain an exemption aimed at permitting "normal farming activity," it is the interpretation of what is normal that is causing much turmoil.

The first direct Congressional action to slow the conversion rate of wetlands for agriculture was a little-noticed provision of the Food Security Act of 1985, the basic farm law. A provision of the law known informally as the Swampbuster section, bars farm program benefits for farmers who convert wetlands into tilled fields and then plant major annual crops on the converted land.

The authority of the Corps of Engineers comes from the Clean Water Act. Corps officials say that farmers can still plow and plant crops in wetlands and that if they are willing give up their farm program subsidies, they can even clear forested wetlands for farm fields. But they are prohibited from digging up stumps and taking earth balls with the roots: filling the stump holes and tearing through the fields with machinery, like bulldozers not normally used in farming.

By the Corps' interpretation, as Mr. McGown put it, "piling dirt on dirt in my fields is polluting the waters of the United States."

Farmer's Plight Begins

Mr. McGown unsuspectingly stepped into his legal quagmire when he bought the 255-acre farm in 1981. He then began to clear old fields, which he said had been in production over much of the last century but had been allowed to revert to brush in recent decades under an old Agriculture Department program known as the "Soil Bank." That program paid farmers to take land out of production.

As he and farm program executives now tell it, because he had started clearing his fields before passage of the Food Security Act of 1985 he ran into no real problems for a time.

The trouble, he said, began in 1987 when he set out to repair a break in a levee caused by a flood from a small stream and to raise the rest of the levee, which had subsided over the years, to its original height.

At that point, Mr. McGown said, agents of the Corps of Engineers arrived and told him that he was depositing fill in wetlands and that, to do that, he would need a permit. If he applied for it, the permit would cost him $10, he was told. He applied.

Except for that action, he said, he has never acknowledged that his fields were wetlands. Meanwhile, he and his lawyer say, the Government's definition of wetlands was changing.

Definition of Wetlands

In a letter issued in 1986, the Corps defined wetlands this way: "The term 'wetlands' means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions."

For emphasis it added this sentence: "Wetlands generally include swamps, marshes, bogs and similar areas." It added for further emphasis: "We have listed swamps, bogs, and marshes at the end of the definition to further clarify our intent to include only truly acquatic areas."

Never since he has owned it, Mr. McGown says, has his land included those "swamps, bogs and marshes."

Last year, without seeking public comment, a new definition was produced by the Corps and three other agencies: the Fish and Wildlife Service, the Soil Conservation Service and the Environmental Protection Agency. Under that definition, it was sufficient to class a parcel of cultivated fields as wetlands if Federal experts found that the land, if it were not being farmed, would sustain vegetation typical of life in saturated soils.

It was such an expert who found on Mr. McGown's fields the plant that he says is a cattail and Mr. McGown says is grain sorghum.

"That $10 permit could be the costliest paper anybody ever got," Mr. McGown said. To allow him to continue restoration of part of his fields and the protective levees, the Corps has proposed that, in "mitigation" for his damage to wetlands, he cede about 25 percent of his land to Federal control as a wildlife easement. Another condition of the permit is that the easement be written into the property deed as a permanent restriction for the present and all future titleholders.

Mr. McGown and his lawyer, Edwin Harvey, have sued in the Federal District Court in St. Louis asking for a declaratory judgment that his farm is not a wetland and seeking a restraining order requiring that he be let alone to farm his land without hindrance of the Federal agencies.

"Bit by bit and month by month I have lost the rights to my property," said Mr. McGown. "Bit by bit, they are using the Clean Water Act to capture farmers' property."

The Corps has asked for dismissal of the action, arguing that he is seeking what they cannot give — that they stop enforcing the Clean Water Act.

I spent $105.000 to buy the farm, $140.000 to improve it and $40,000 so far to fight them," he said. "But if they have their way, what I will have left is little more than the right to walk on it."

JUN 11 1990

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-1735

JOHN POZSGAI,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
for The Third Circuit

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF
SOUTHEASTERN LEGAL FOUNDATION, INC.
AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

The Southeastern Legal Foundation, Inc. (hereafter "Southeastern") submits its brief *amicus curiae* in this case. The parties have consented to the filing of this brief, and their consent letters have been filed with the Clerk of this Court.

Southeastern is a non-profit corporation organized in 1976 for the purpose of advancing public interest viewpoints in adversarial proceedings involving significant issues. Dedicated to economic and social progress through the equitable administration of law, Southeastern presents

the views of its supporters who believe the rights of all persons should be properly protected and balanced in the courts. Towards that end, Southeastern has participated as *amicus curiae* in a number of cases before this Court, including *Common Cause v. Schmitt*, 455 U.S. 129 (1982); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982); *South Florida Chapter of the AGC of America, Inc. v. Metropolitan Dade County, Florida*, 723 F.2d 846 (11th Cir. 1984), *cert. denied* 469 U.S. 871 (1984); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); and *City of Richmond v. J.A. Croson Co.*, ___ U.S. ___, 109 S.Ct. 706 (1989). Additionally, Southeastern has recently submitted *amicus curiae* briefs in *Astroline Communications Company Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, No. 89-700 (decided June 27, 1990); *U.S. v. Eichman and U.S. v. Haggerty*, Nos. 89-1433, 89-1434 (decided June 11, 1990); and *Pacific Mutual Life Insurance Company v. Haslip, et al.*, No. 89-1279, which is currently pending before this Court.

Southeastern believes this case merits review by this Court because it presents serious questions of how individual rights can be protected from governmental excesses in the enforcement of laws for the ostensible protection of the environment and the administration of justice by the lower federal courts. It is vitally important for the courts to protect these individual freedoms in the face of the increased criminal enforcement of the myriad of environmental laws, both current and future. While *Amicus* supports all four of the questions presented by Petitioner, this brief will focus on question III, dealing with the validity of the Sentencing Guidelines.

STATEMENT OF THE CASE

Southeastern adopts the statement of the case contained in Petitioner Pozsgai's Petition for A Writ of Certiorari.

SUMMARY OF ARGUMENT

The 27-month sentence Petitioner Pozsgai received under the Sentencing Guidelines for violating the Clean Water Act highlights some of the problems contained in the Sentencing Guidelines for environmental offenses. One of the most significant problems with the environmental guidelines is that they result in sentences which exceed the maximum sentence permitted by the underlying environmental statute. This not only alters or reverses the Congressional determination of the seriousness of the category of offense, but impermissibly reduces the range of sentences required by the Comprehensive Crime Control Act to a single term of imprisonment — the statutory maximum.

Furthermore, the Guidelines fail to contemplate sentences other than imprisonment for first offenders of environmental laws. The Guidelines both violate the Sentencing Commission's enabling statute and conflict with the underlying environmental laws.

Due to the importance of the issues raised by the trial court's application of the Sentencing Guidelines, this Court should grant certiorari to review this conviction under the Court's supervisory powers over the administration of criminal justice in the lower federal courts.

ARGUMENT[1]

I. The History of The Guidelines.

Beginning in the 1970s, Congress considered several pieces of legislation designed to improve federal sentencing practices. *See generally*, C. Ogletree, Jr., "The Death of Discretion? Reflections on the Federal Sentencing Guidelines," 101 *Harvard L. Rev.* 1938, 1944, n. 34 (1989). The most frequent criticism of the existing sentencing practice was that it gave excessively broad discretion to sentencing judges, resulting in widely disparate treatment for similarly situated individuals. *Id.*

In 1984, Congress enacted the Comprehensive Crime Control Act, which established the United States Sentencing Commission as "an independent commission in the judicial branch." 28 U.S.C. Section 991(a). The Commission was tasked with drafting sentencing guidelines that would result in more definitive sentences and narrow the disparity in sentences imposed on similarly situated offenders for comparable criminal conduct. 28 U.S.C. Section 991(b)(1)(B). However, the Sentencing Commission was expected to leave federal judges with sufficient flexibility to impose individualized sentences warranted by mitigating or aggravating factors not taken into consideration in the general sentencing guidelines. 18 U.S.C. Section 3553(b).

Following its creation, the Sentencing Commission conducted extensive public hearings and a research pro-

1 Many of the arguments presented in *Amicus'* brief are drawn directly from Benjamin S. Sharp and Leonard H. Shen's paper, "The (Mis) Application of The Sentencing Guidelines To Environmental Crimes,' which was presented at the ALI-ABA Course of Study Criminal Enforcement of Environment Laws seminar on April 19-20, 1990 in Washington, D.C. Messrs. Sharp and Shen are attorneys with the Washington, D.C. law firm of Perkins Coie.

gram analyzing approximately 100,000 federal criminal cases. After receiving considerable public comment on a preliminary draft of the guidelines issued in September 1986, a revised draft was submitted for public comment in January 1987 and became final on November 1, 1987.

Insofar as relatively few environmental crimes had reached actual sentencing before the final Guidelines were released in 1987, the guidelines that deal with environmental crimes did not have as extensive an "experience baseline" to guide the drafters, as did all other guidelines. As a consequence, the Commission appears to have ignored existing historical sentencing data in this area and filled the experience void with its own arbitrary choices. The policy decisions ultimately made by the Commission seem unconstrained by congressional directives and at odds with policy choices made by Congress when it enacted the substantive environmental statutes.

Indeed, the paucity of environmental prosecutions and the relatively lenient sentences imposed before the Guidelines were promulgated (*See Petition for Cert.* Appendix 30A-39a) underscore the regulatory nature of these environmental infractions. Unlike crimes such as bank robbery, arson, and rape, the government is able to control, correct, and civilly punish environmental infractions. Consequently, even the sentencing data that does exist on environmental criminal cases is, in effect, not truly representative of how society deals with this "crime," because the same conduct, and sometimes even *worse* conduct, is disposed of *outside* the criminal justice system.

II. The Guidelines Prescribe The Maximum Statutory Sentence For Certain Categories of Environmental Violations.

Several categories of environmental crimes are misdemeanors. All Toxic Substances Control Act (TSCA) criminal violations are misdemeanors, with a maximum imprisonment term of one year and a maximum fine of $25,000 per day of violation. 15 U.S.C. Section 2615(b). Most Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) violations are similarly punishable by up to one year imprisonment, although a private applicator may only be imprisoned for up to 30 days. 7 U.S.C. Section 1361(b). Clean Water Act (CWA) negligent violations also trigger a one-year imprisonment maximum. 33 U.S.C. Section 1319(c)(1).[2]

Yet because the Guidelines fail to distinguish between misdemeanors and felonies, the statutory maximum terms may often be *exceeded* by a sentence calculated under the Guidelines. For example, the shortest Guideline sentence available for a base level offense violation of FIFRA by a private pesticide applicator (base level 8) is from 2 to 8 months, which is from *two to eight times* the statutory maximum (30 days). *See* Section 2Q1.2.

A violation of the Clean Water Act has been transformed by application of the Guidelines into a much more

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2 The Application Notes accompanying Section 2Q1.2 (Note 4) and Section 2Q1.3 (Note 3) indicate that downward departures may be appropriate for negligent violations. No guidance is provided suggesting how great a departure may be warranted or whether wholesale abandonment of the guidelines for misdemeanors is appropriate. Some courts have likened the notes to legislative history that cannot override the guideline or be resorted to unless there is facial ambiguity in the guideline. *See, e.g., U.S. v. Anderson*, 895 F.2d 641, 645 (9th Cir.1990).

serious transgression than the statute itself would suggest. The CWA sets a statutory maximum of three years imprisonment for so-called "knowing" violations (one year for negligence) that do not rise to the level of a "knowing endangerment." 33 U.S.C. Section 1319(c)(2).

Despite this statutory maximum, however, the Guidelines' choice of specific offense characteristics will in virtually all cases assure a minimum offense level of 14 to 18 for any CWA violation, including those involving a non-hazardous pollutant such as fill dirt, which happened in this particular case with Mr. Pozsgai. This would result in a sentence just within the statutory maximum range for a felony and well above the maximum for a misdemeanor, for a defendant with no prior criminal history, and a sentence above the statutory maximum for defendants with any prior history.

For example, specific offense characteristic (b)(4) requires a four-level increase for discharges without a permit or in violation of a permit (in the case of non-hazardous water pollutants), or for disposal without a permit or in violation of a permit (in the case of hazardous water pollutants). Since virtually all violations of the CWA involve discharge in violation of or without a permit, this will *automatically* result in an effective base level of 10 (6 + 4).

Next, characteristic (b)(1) requires a four-level increase for any discharge of a pollutant, which by definition will always be the case whenever there has been a discharge in violation of a permit.[3] (If the discharge is ongoing, continuous, or repetitive, again the likely scenario for CWA violations, there will be a six- level

3 Although the Guidelines do not define pollutant, the CWA does. A pollutant includes "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical waste, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. Section 1362 (6).

increase.) Finally, many discharges into publicly owned treatment works (POTWs) would qualify as "disruption of a public utility," requiring an additional four points.

Therefore, the total offense level for virtually any Clean Water Act violation is at least 14, and in a substantial portion of CWA cases, closer to 18 or 20 — right at the statutory maximum level. Thus, for example, the court in *United States v. Ocie Mills and Carey Mills*, No. 88-03100-01/WEA (N.D. Fla. 1989), *aff'd without opinion* (11th Cir. No. 89-3325, May 15, 1990), sentenced the defendants each to 21 months in prison for filling a 75 ' x 300' wetlands area with dirt, invoking the "ongoing or repetitive release" characteristic of Section 2Q1.3(b)(1) and the "discharge without a permit" characteristic of Section 2Q1.3(b)(4).

In Mr. Pozsgai's case he was charged with discharging earth and clean fill without a permit in violation of the Clean Water Act, 33 U.S.C. Sections 1311(a), 1319(c)(2)(A), 1344(a). He received six points, which was the base offense level, for discharging a pollutant without a permit. Section 2Q1.3(a). In addition to the base offense points, he received six more points for discharging a pollutant (Section 2Q1.3(b)(1)(A)), and four more points for not having the permit (Section 2Q1.3(b)(4)).

A. By Prescribing The Statutory Maximum, The Guidelines Violate Their Enabling Statute.

The Guidelines do provide that where the guidelines sentence would exceed the statutory maximum, the statutory maximum controls. *See* 18 U.S.C. Section 3559(b); Section 5G1.1 (statutory maximum governs as to an imprisonment term); *see also* Section 5E1.2(c)(4) (statutory fine if based on a per day violation will govern instead of the

Guidelines fine). It is, of course, clear that an independent agency cannot lawfully preempt the Congressional judgment in the original substantive statute by prescribing a regulatory sentence more severe than the appropriate maximum sentence for particular environmental violations.

However, the Guidelines effect an analogous result of questionable validity. The Sentencing Commission has compressed the range of sentences available, turning the penalty into a mandatory *minimum* (and maximum) for many types of crimes. Although there is no *per se* constitutional defect in statutes providing mandatory minimum sentences — *see, e.g., McMillian v. Pennsylvania,* 477 U.S. 79, 92, 106 S.Ct. 2411 (1986) — by establishing what amounts to a flat sentence, the Guidelines here violate the Comprehensive Crime Control Act itself, which requires that the Commission establish a sentencing *range* for each category of defense. *See*, 28 U.S.C. Section 994(b)(1); *see also, Mistretta v. U.S.*, ___ U.S. ___, 109 S.Ct. 647, 656 (1989). Furthermore, for sentencing involving imprisonment, Congress mandated that "the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or six months." 28 U.S.C. Section 994(b)(2). Where the Guidelines result in a *minimum* sentence of one year for misdemeanors, or a sentencing range for felonies where the minimum is less than 25 percent below the maximum, it is clear that the Guidelines are inconsistent with their enabling legislation.

This result also violates Congress' mandate that "the Commission shall insure that the guidelines reflect the general inappropriateness of imposing a sentence to a term of imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." 28 U.S.C.

Section 994(j). Insofar as very few of the misdemeanor violations of TSCA or FIFRA, or a negligent violation of the CWA, can be considered a "crime of violence or an otherwise serious offense," the imposition of not only a sentence of imprisonment, but the *maximum* available sentence, clearly violates the leniency Congress intended *and* required for a first offender. *Id.*

Finally, as a policy matter it is troubling that whole categories of environmental crimes have suddenly been transformed into mandatory minimum violations by a Commission that was not charged by Congress to rewrite priorities in environmental enforcement. Apart from tending to transform a statutory maximum into a sentencing minimum, the fact that the specific offense characteristics are virtually always triggered in the Clean Water Act context, for example, means that a CWA violation will *per se* be treated much more seriously than another environmental violation — even if Congress assigns a lower statutory maximum to the CWA than, for example, many RCRA permit violations. *Compare* 33 U.S.C. Section 1319(c) with 42 U.S.C. Section 6928(d).

Indeed, this uniform aggravation of sentencing for Clean Water Act violations disrupts the carefully crafted hierarchy of criminal penalties (with different terms for negligent, knowing, and knowing endangerment crimes) established by Congress' 1987 CWA amendments. A *specific* and *substantive* statutory scheme — the CWA — setting forth explicit offenses and sentencing ranges, cannot constitutionally be overridden by a general statutory framework intended by Congress to set overall sentencing parameters. In this instance, the Guidelines, and the Sentencing Commission, have become the tail wagging the environmental dog. This violates principles of separation of powers. U.S. Const., Art. I, Sec. 1; see *Mistretta v. U.S., supra.*

B. The Specific Offense Characteristics Bear Little Relation To Policy Choices Made In The Underlying Statutes.

Most guidelines in other areas cover specific crimes (*e.g.*, perjury) and use the offense characteristics to differentiate common circumstances surrounding the crime (*e.g.*, causing physical injury to a person or resulting in substantial interference with the administration of justice) as aggravating or mitigating factors. *See*, Section 2J1.3. By contrast, the environmental guidelines attempt to encompass an extensive range of offenses under two guidelines that cannot reasonably be tailored to the diversity of crimes to which they apply. The offense characteristics and their Application Notes cannot apply the myriad factual circumstances that may aggravate or mitigate so many offenses. As a consequence, neither the base levels nor the offense characteristics are common to the bulk of the offenses covered. Moreover, the specific offense characteristics used as adjustment factors fail to follow the logic of the underlying environmental statutes.

In the case of single as opposed to repetitive releases, both Section 2Q1.2 and Section 2Q1.3 provide for increasing the base offense level by six levels "[i]f the offense resulted in an ongoing, continuous, or repetitive discharge of a. . . pollutant into the environment," while the base offense level may only be increased by four levels "if the offense otherwise involved a discharge, release, or emission of a pollutant." Section 2Q1.2(b)(1); Section 2Q1.3(b)(1).

While it may make good policy sense to impose a greater sentence where a continuous or repetitive environmental discharge is occurring, this guideline ignores the fact that the substantive environmental statutes passed by Congress already provide for separate counts

for such discharges, and the criminal fine provisions of both the statutes and the guidelines already allow per-day fines. Section 5E1.2(c); *Cf. Chesapeake Bay Foundation v. Gwaltney of Smithfied*, 791 F.2d 304, 316 (4th Cir. 1986) (assessing protracted Clean Water Act civil violations at approximately $5,000 per day), *rev'd on other grounds*, 108 S.Ct. 376 (1987); *U.S. v. T & S Brass, Inc.*, 681 F.Supp. 314, 322 (D.S.C. 1988) (imposing $1,000 per day for RCRA civil violation); and *U.S. v. SCM Corp.*, 667 F.Supp. 1110, 1128 (D.Md. 1987) (assessing sequential Clean Air Act violations at $10,000 per day).

The underlying statutes are thus already finely tuned to increase the ultimate penalty in accordance with the continuous or repetitive nature of the discharge; yet the Guidelines now *double count* a multiple discharge violation, by increasing the offense level for each individual violation as well as allowing sentencing for multiple counts. *See*, Section 5G1.2. Insofar as many Clean Air Act and Clean Water Act discharge violations involve dozens or even hundreds of days of effluent or air emission releases, increase of the penalty will be applicable in the vast majority of circumstances under the Guidelines — despite the fact that Congress, when it established the availability of per-day violation fines in the environmental laws, had already considered and allowed charging for repetitive violations.

III. Certiorari Should Be Granted.

Amicus submits that the circumstances of this case present important and unanswered questions as to the application of the Sentencing Guidelines to a conviction such as Petitioner's, and to environmental crimes generally. Moreover, there is a serious question as to whether

the U.S. Sentencing Commission followed the congressional mandate in enacting Section 2Q1.3 of the Guidelines.

This Court has jurisdiction *sub judice* for the same fundamental reason set forth in *McNabb v. U.S.*, 318 U.S. 332, 63 S.Ct. 608, 613 (1943). "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *Id.* Due to the harshness of the sentences imposed on Petitioner, and because of the questions as to the legality and appropriateness of the Guidelines for environmental law crimes, this Court should grant review.

CONCLUSION

This Court should grant Petitioner Pozsgai's petition for certiorari.

Respectfully submitted,

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